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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 91.

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

J. PAUL SMITH.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 27, 1910.

(22,243)

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1 In the Court of Appeals of the District of Columbia.

No. 2107.

ELLA ANDERSON, Adm'x, &c., Appellant,
vs.
J. PAUL SMITH.

Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff,
vs.
J. PAUL SMITH, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration, &c.

Filed June 22, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff,
vs.
J. PAUL SMITH, Defendant.

First Count. The plaintiff, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a Special Term for Probate Court, and who now here brings her Letters of Administration in that behalf, sues J. Paul Smith, the defendant, for that

2 on, to wit, June 29, 1906, and at the time of the grievances hereinafter mentioned, the said defendant was engaged in tearing down or wrecking a building situated on M Street near 24th Street, Northwest, this City and District, and while so engaged, had in his employ and at work on the tearing down of said building, one Charles P. Anderson; that it then and there became and was the

duty of the said defendant to exercise reasonable care in and about the doing of said work, in order that a reasonably fit, proper and safe place might be provided for his employees in which to work, but notwithstanding his duty in this regard, he became and was negligent in that he failed to provide a reasonably fit, proper and safe place for his employees to work, whereby and by reason of which said negligence, the said Charles P. Anderson, while in the employ of the said defendant, and engaged in and about the tearing down of said building as aforesaid, without fault or negligence on his part, was killed by the premature falling of a large and heavy door frame upon him; that said intestate left surviving him as his only next of kin, his widow, Ella Anderson, Administratrix, plaintiff herein; his son, Oliver Anderson, and his daughters, Cora Hundley, and Sephronia, Helen and Barbara Anderson, all of whom have suffered great damage, and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises a cause of action has accrued to her as Administratrix as aforesaid, as by the Statute in such case made and provided, and for the benefit of such next of kin mentioned, as aforesaid, who have sustained damage in the sum of $10,000.00, which amount she claims besides costs of this suit.

Second Count. The plaintiff, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, duly appointed such by the Supreme Court of the District of Columbia, holding a special term for Probate Court, and who now here brings her Letters of Administration in that behalf, further sues the defendant, J. Paul Smith, for that on, to wit, June 29, 1906, and at the time of the grievances hereinafter mentioned, the said J. Paul Smith, defendant, herein, was engaged in tearing down or wrecking a building on M Street, near 34th Street, Northwest, this City and District and while so engaged had in his employ on said work of tearing down or wrecking said building, one Charles P. Anderson; that it then and there became and was the duty of the said defendant to exercise reasonable care in and about the doing of said work, and to see that reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men were used in and about the taking down of a large and heavy door-frame from said building, but notwithstanding his said duty in this regard, he became and was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door-frame, whereby and by reason of which said negligence, the said Charles P.

3 Anderson, while in the employ of the said J. Paul Smith, and engaged in and about the tearing down of said building as aforesaid, without fault or negligence on his part, was killed by the premature falling of the said door-frame upon him, and the plaintiff says that said intestate left surviving him as his only next of kin, his widow, Ella Anderson, Administratrix, plaintiff

herein; his son, Oliver Anderson, and his daughters Cora Hundley, and Sephronia, Helen and Barbara Anderson, all of whom have suffered great damage, and who will continue to suffer great damage in the future by reason of the negligently caused death of the plaintiff's intestate as aforesaid.

Wherefore the plaintiff says that by reason of the premises a cause of action has accrued to her as Administratrix as aforesaid as by Statute in such case made and provided, and for the benefit of said next of kin mentioned as aforesaid, who have sustained damage in the sum of $10,000.00, which amount she claims, besides the costs of this suit.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and Legal Holidays occurring after the day of service thereof; otherwise judgment.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

DISTRICT OF COLUMBIA. *To wit:*

I, Ella Anderson, Administratrix of the estate of Charles P. Anderson, deceased, on oath depose and say that I am the plaintiff in the Declaration to which this Affidavit is annexed; that as Administratrix of the estate of the said Charles P. Anderson, deceased, I believe I have a good and meritorious action, and am advised by counsel that my cause of action is a good one; that as Administratrix of the said estate I have absolutely no assets of any kind from the estate of the said decedent; that said decedent at the time of his death owned no property whatever, either personal or real, and left as his only asset this cause of action herein; that I personally, and the other next of kin have no means whatever wherewith to pay the necessary Court costs for the filing of this Declaration, and pray the Court that I may be allowed to file the same in forma pauperis without advancing the necessary costs.

her
ELLA x ANDERSON.
mark

Subscribed and sworn to before me this 21st day of June, A. D., 1907.

[SEAL.] JOHN A. SWEENEY,
Notary Public, D. C.

4 (Endorsed.)

Let this be filed without costs in forma pauperis.

WENDELL P. STAFFORD, *Justice.*

Plea.

Filed July 18, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Plaintiff.

vs.

J. PAUL SMITH, Defendant.

The defendant, for plea to the declaration herein exhibited, and each count thereof, says that he is not guilty in manner and form as therein alleged.

MADDOX AND GATLEY,
Attorneys for Defendant.

Joinder of Issue.

Filed July 22, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix, etc., Plaintiff.

vs.

J. PAUL SMITH, Defendant.

The plaintiff joins issue on defendant's plea heretofore filed in the above entitled cause.

LEONARD J. MATHER,
E. N. HOPEWELL,
Att'ys for Pl'ff.

Memorandum.

October 25, 1909.—Verdict for Defendant.

5 Supreme Court of the District of Columbia.

SATURDAY, *October* 30, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Pl'tf.

vs.

J. PAUL SMITH, Def't.

The time within which to move for a new trial having expired, judgment on verdict is ordered.

Therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day, and recover against the plaintiff, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

Order for Appeal and Citation.

Filed November 8, 1909.

In the Supreme Court of the District of Columbia, the 8 Day of November, 1909.

Law. No. 49559.

ELLA ANDERSON, Administratrix,
vs.
J. PAUL SMITH.

The Clerk of said Court will please note an appeal in above case and issue citation.

LEONARD J. MATHER,
E. N. HOPEWELL,
Attorneys for Pl'ff.

In the Supreme Court of the District of Columbia.

At Law. No. 49559.

ELLA ANDERSON, Adm'x of Estate of Charles P. Anderson,
vs.
J. PAUL SMITH.

The President of the United States to J. Paul Smith, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing
6 the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal from the Supreme Court of the District of Columbia, on the 8th day of November, 1909, wherein Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased — Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 8th day of November in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*
By H. BINGHAM, *Ass't Clerk.*

Service of the above Citation accepted this 8th day of Nov. 1909.
MADDOX AND GATLEY,
Attorneys for Appellee.

[Endorsed:] No. 49559. Law. Anderson, Adm'x vs. Smith. Citation. Issued Nov. 8, 1909. L. J. Mather, E. N. Hopewell, Attorneys for Appellant.

Memoranda.

November 12, 1909.—Appeal bond filed.
December 21, 1909.—Time to file record in Court of Appeals extended to January 14, 1910.

Supreme Court of the District of Columbia.

TUESDAY, *January* 4, 1910.

Session resumed pursuant to adjournment. Mr. Justice Wright presiding.

* * * * * * *

At Law. No. 49559.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Pl'tf,
vs.
J. PAUL SMITH, Def't.

Now comes here the plaintiff by her Attorneys and prays the Court to sign, seal and make part of the record her bill of exceptions taken during the trial of this cause, (heretofore submitted) now for then, which is accordingly done.

7 *Bill of Exceptions.*

Filed January 4, 1910.

In the Supreme Court of the District of Columbia.

Law. No. 49559.

ELLA ANDERSON, Administratrix,
vs.
J. PAUL SMITH.

Be it remembered that this cause came on for hearing on the 25th day of October, 1909, before the Honorable Daniel Thew Wright, one of the Justices of the Supreme Court of the District of Columbia, and a jury.

And, thereupon, after the jury had been duly sworn, the plaintiff to maintain the issues on her part joined, testified that she was the

widow of the decedent Charles P. Anderson, who had been killed on or about June 29th, 1906, and after making profert of her Letters of Administration, that she was administratrix of his estate, having been duly appointed such by the Probate Court of this District; that at the time of his death her husband was about fifty or fifty-two years of age; that they had been married thirty years; that her husband was working for Mr. John Paul Smith in Georgetown, at a building, at the time of his death; that his other occupation was that of a cook. Most of his work was cooking. He made $7.50 a week on week days and on Sundays would earn $2.50 or $3 cooking. He was always at work and gave me his earnings. I don't remember his having lost six months' work during our entire married life because of sickness. I have five children.

On cross-examination the witness testified that her youngest child was a girl aged nineteen years. Her other children are all over twenty-one. Her husband worked for Mr. Smith for a long time. Doesn't know exactly how long. That was during the summer because he cooked during the winter.

Whereupon, the plaintiff, to further maintain the issues on her part joined, gave in evidence the testimony of JOHN PARKER.

My place of business is at 34th and M Streets. I saw the accident when Anderson was killed. I was standing out front and saw the men working to take down this door. The door was about ten or twelve feet high. It wasn't but a few minutes before the door came right down flat. There were two men on the outside prying it up with crow bars about three or four feet long,—medium sized men, weighing from 145 to 150 lbs. apiece. It stood on a stone sill. There were some five or six men inside trying to catch the door and when these men pried it up out of this socket the door went right over like that. It was a double door frame with glass on either side of the door and a heavy skylight over the door in the transom and
8 then a heavy lintel that runs the whole length of the door and catches onto the brick wall; a four by four scantling, or something or other like that. The door weighed nothing shorter than twelve or fifteen hundred pounds. It was about ten feet wide. The glass was kind of flowered, leaded glass diamond shape. Each door was about three feet wide. The two men on the outside were prying the door up with crowbars to lift it out of the socket. After they had pried the door loose nothing happened only the door tumbled right down. It went down on the inside. There was five or six men propped up on the inside trying to hold the door, and of course, it wasn't enough men to catch the door, and when these men pried it up out of this socket, the door went over right like that (indicating), just as quick as that (indicating). I was slightly acquainted with Anderson. He was standing in the center of the door when it fell. No appliances of any sort was used in taking down the door. The foot was not blocked to prevent it from slipping. No rope was used. After Anderson was hurt the whole force that worked on the job was called there to pick the door up. There were more men called there for that purpose than there were there

to take the door down. I seen them take the door over there and set it alongside of the brick pile. It took ten men to bring the door down to the brick pile. The men with the crowbars were on the edge of the door sill. There is a socket in the stone sill which goes down into the stone to sort of keep the door from going to the front or back the other way. Of course they had to keep under the edge of the door sill and just prize it out of that socket, and when they prized it out of the socket the door was entirely loose and all it had to do was to go. I heard the order given to go up and take the door down. There was no warning given to Anderson.

On cross-examination the witness testified as follows.

I am in the junk business. I was standing about forty or fifty feet away from the building. I know how the door was fastened because I examined it afterwards. Didn't notice whether the door was toenailed into the subfloor. I never measured the door. When I said no warning was given to Anderson I mean to say that I did not hear any warning. Anderson was standing in the center of the door. They were prying the door up to loosen it and let it go and of course it would go towards him and the rest of them too. Some five or six men had hold on each side of the door to let it down. There were colored men on one side of the door and white men on the other side. There were colored men on each side of the door.

Whereupon ZACH HARPER was called as a witness and testified in chief in substance as did the preceding witness. He further testified as follows:

The door frame was removed from the building shortly after the accident and he helped to move it.

(Q.) How many men did it take to move that door? To which question counsel for the defendant objected, which objection was sustained by the Court. To this ruling of the Court counsel for
9 the plaintiff then and there notes an exception which was duly noted upon the minutes of the Court.

On cross-examination the witness testified as follows:

That the house had been torn down as far as the first floor with the exception of this door frame. The first floor was all clear; there was no rubbish around. I was loading a cart at the time. I have talked with no one about the matter since it happened, only with the lawyer (meaning Mr. Mather). Did not tell Mr. Edward M. Cleary, a member of the bar, shortly after the accident, or at any other time, that "I was loading a cart at the time of the accident and did not see it."

Whereupon WILLIAM ESTRIDGE was called as a witness and testified as follows:

I was working on the building for Mr. Smith at the time Anderson was killed. (Witness then described the character of the door frame in substance as did the witness John Parker.) He testified further that Mr. Dougherty, the foreman, ordered the men to take the door down. He didn't say any particular number of men but

just said go up there and take it down. There were seven of us there on the inside of the door. I was standing on the left side of the door and Anderson was standing in the center of it. There were two men on the outside of the door prizing it up from the bottom with crowbars; they were bearing down on the bars; the bars being three or four feet long. When they got it loose it just came right on over. Does not know of Dougherty's giving any warning when he told the men to go up and take the door down. A lot of men helped raise the door off Anderson—more men than were helping lower the door. I remember two of the white men who were helping, Collins and Dougherty. Don't remember the other white man. Joseph Wilson. There were five men on the side where I was. Anderson was in the middle of the door and they were going to pull the door over towards him.

Whereupon RICHARD COLLINS was called as a witness and testified as follows:

That he was working for the defendant on the building at the time of the accident. Dougherty said "men come up here and get hold of this door and take it down." I believe there were eight of us. I was on the inside of the door. There were two men, Italians, heavy set men on the outside prying the door up from the bottom, with crowbars about four feet long. They were jumping their weight on this bar. There were seven men on the inside of the door frame. Anderson was in the middle and I was standing a little over him directly behind him; he got underneath the middle of it. The other men were on each side, and some were right on the side. They arranged themselves in this fashion (indicating arms stretched overhead and legs braced to lower the door as it was pried over). When the men pried the door loose it came on over; we couldn't hold it. There was not anything there—no block or nothing there to take any weight on it, or nothing, and it just dumped right on over, and the men couldn't hold it. I had to fall down and it cut my shirt and suspenders and all right straight off across my back. Anderson was right in the middle of it and that's what kept the weight off me. It mashed him right down flat. He was standing up straight and it mashed him right on down, and carried him down in that fashion. I was trying to hold the door until everybody let go of it. They all had to let go of it, they couldn't hold it. (Witness then describes the door in size, weight, and character, in substance as had already the witness John Parker, adding, however,) that there was plastering there outside and on top and on each side of the door frame; that the wall had been taken down all around it; that Dougherty, the foreman, didn't give us any warning any more than to take that door down. He didn't use anything at all to help it down, no more than our hands. There was no block put at the foot of the door.

On cross-examination the witness testified as follows:

I remember two white men having hold of the side of the door frame, Dougherty and Collins; don't remember Wilson. Don't know exactly how many colored men had hold of the other side. There

were seven altogether. They were placed all around. Anderson stood in the middle of the door. Don't know how long Anderson had been working on the building. He was there when I went there four days before.

Whereupon THOMAS PARKER was called as a witness and testified as follows:

I am a son of John Parker who testified a little while ago. I was standing right where I worked fifty or sixty feet from the building. (Witness then described the size, weight and character of the door in substance as did the witness John Parker.) The witness further testified: I didn't hear any order given to take the door frame down but saw the men go up there to take it down. There were seven or eight men. There were two men each weighing from 150 to 160 pounds prying the door out of the socket with crowbars, about four feet long. There were no implements around there to take the door down. When the men pried the door out of the socket it came with a sudden force and of course it was too heavy for them to hold it and it just came on down. These men took the point of the bar and put it right underneath where the sockets are and pried it up and then they put their weight right down on it and pried it up. I went closer after the accident. Dougherty and another gentleman pulled Anderson from underneath it. Ten men lifted the door frame off Anderson. Richard Collins came near getting hurt too. The door tore his shirt. It struck him in the back and tore his shirt right down. Whereupon the following questions were asked the witness:

Q. Were you there when that door was taken from the building and removed to the sidewalk? A. Yes sir.

Q. How many men took it there? To which question counsel for the defendant objected, which objection was sustained by the Court. To this ruling of the Court counsel for the plaintiff then and there noted an exception, which exception was duly noted on the Court's minutes.

11 On cross-examination the witness testified as follows:

At the time of the accident my father was standing right by me. I was standing fifty or sixty feet away from the building. From that distance I could tell that the door was fastened on a stone sill with iron bars or something down in the sockets in the sill. These iron bars were about an inch in diameter. I don't know how they were fastened into the stone sill. I don't know whether Joseph Wilson had hold of one side of the door with Mr. Dougherty and Mr. Collins. Three colored men had hold of the other side of the door and three white men had hold of one side of it. Anderson stood in the middle right by the door-knob.

Whereupon ERSKINE M. SUNDERLAND was called as a witness, and, after having been qualified as an architect and engineer, the following question was asked:

Q. We are investigating here as to the fall of a large door frame, and I am going to put a hypothetical question to you. Assume this

door frame to be 12 to 15 feet in height and from 10 to 12 feet in width, with a lintel block on the top 4 by 4 extending clear across the width of the door with a leaded glass transom underneath, some 2½ feet in width semi-circular in form, with glass panels on either side of the door extending to within a foot and a half or two feet of the ground. Assume that the leaded glass side lights on either side of the door extend to the same distance from the ground and the door weighs from twelve to fifteen hundred pounds; that seven men were on the inside of that door frame and two men on the outside of the door frame, the two men on the outside weighing between 150 and 165 pounds, and that each of them had a pinch bar four feet in length, which bar was inserted under this door frame and that each man used his weight on the end of that bar to pry loose that door frame from where it was doweled into a stone sill by two bars or dowels about an inch in diameter. Assume further, if you please, that no appliances of any sort were used in taking down that door frame and no blocks were placed at the foot of this door frame to prevent its slipping, and that when it was pried loose it fell down. Would you consider that a safe or unsafe way to attempt to take down that door? To which question counsel for the defendant objected, which objection was sustained by the Court on the ground that the question was not a matter for expert opinion. To this ruling of the Court counsel for the plaintiff took an exception, which exception was duly noted on the minutes of the Court.

Whereupon the witness was asked to compute the acceleration of force acquired by this door in falling from its position under the facts assumed in the former hypothetical question, taking, however, the minimum in weight and dimensions as the basis for calculation. The witness stated as follows: I have not taken that leverage force into consideration at all. I can give you that too.

Q. Would that increase or lessen it? A. It would increase it. You told me to take it at a minimum.

Q. Give us your computation without that extra force or
12 leverage. —. I have figured it secured at the toe and have its falling weight in pounds for every foot from one up to twelve feet. I can give you its force at one foot, two feet, and so forth, up to 12 feet, and its striking force in pounds; or I can give it to you as if it were a dead weight falling, not secured at the toe where you say it was doweled or toe-nailed.

Secured at the toe its striking force would be 5334 pounds at 12 feet; 3700 pounds at 11 feet; 3400 pounds at 10 feet; 3100 pounds at 9 feet; 2832 pounds at 8 feet; 1770 pounds at 7 feet; 1590 pounds at 6 feet; 1456 pounds at 5 feet; 1450 pounds at 4 feet; 1320 pounds at 3 feet.

On cross-examination the witness testified as follows:

That in his calculation he made no allowance whatever for the resistance which would come from a number of men having hold of the door. That the base of the door carries some of its weight so long as it does not leave the perpendicular and also while it is falling.

Thereupon the plaintiff rested and gave no more testimony to support her case in chief.

And next thereupon, the defendant by his attorneys, moved the Court to direct a verdict for the defendant on the first count of the Declaration, which Motion was granted and an exception noted by the Court upon its minutes.

And next thereupon, the defendant by his attorneys, moved the Court to direct a verdict for the defendant on the second count of the declaration, whereupon, and after argument, the following discussion between the Court and plaintiff's attorney ensued.

The COURT: You are arguing here to me that when a man hires another to do dangerous work he is bound to supply him with paraphernalia and instructions to enable him to do it safely. He is under no such duty at all, and there is no intimation anywhere in the books that he is. Your contention means that no one can employ another to do dangerous work without rendering safe that which is in itself unsafe. The true rule means, as I have said, that if he does furnish paraphernalia, tools and implements, and furnishes defective ones; and the servant is injured by a defect in what he does furnish, it is the negligence of the master in putting the servant to work with something that the servant has a right to believe is not defective, but which turns out to be defective.

Mr. MATHER: Your Honor would distinguish between the master furnishing defective appliances and not furnishing any at all. You would excuse him if he failed to furnish any appliances.

The COURT: There is no duty upon him to furnish any appliances, if he hires a man to work without appliances. How can there be?

Mr. MATHER: I do not take it that he does hire the man to work without appliances.

The COURT: He did not give him any? He says: "Go on
13 and do this work if you will." Is not that hiring him to do it without appliances?

Mr. MATHER: No; when he hires a man to go and take down a building he guara-tees that man that he will have appliances that are reasonably safe for the conduct of that work. Any other rule of law would be disasterous.

The COURT: He is not guilty of negligence. The law is based upon the proposition that you cannot lay traps for other people. When a man supplies a rope or tool or a machine that is defective he is laying a trap for anybody he puts to work with it, because people have a right to believe that it is what it purports to be; that is, reasonably safe; and he is negligent because he lays a trap; but he does not when he omits to furnish anything.

Mr. MATHER: I am not arguing that, may it please the Court. I am arguing this: That when this man went to work for Mr. Smith he had a right to assume, under the guarantee the law gives him, that Smith would furnish reasonably safe appliances for the doing of that work.

The COURT: You assume that the law gives him that guarantee.

That is a new proposition to me. You do not find anything in the law books to that effect.

Mr. MATHER: There is not an authority but what says the duty is upon the Master to furnish reasonably safe and proper appliances.

The COURT: When a man assumes a risk and is hurt by the assumption of that risk, it is his own fault as much as it is the fault of anybody else, and he cannot recover for it. Secondly, there is no theory upon which any negligence of the defendant is shown by the evidence. The only evidence of negligence on the part of anyone is the prying of the door loose, which was done by orders of the foreman. It might have been the negligence of the foreman, but if it was, he was a fellow servant of the plaintiff, and the defendant is not responsible for it.

Take a formal verdict for the defendant.

Mr. MATHER: I take an exception.

Which exception was then and there duly noted by the Court upon its minutes.

And thereupon, after each and all of the said exceptions were duly taken as aforesaid and entered upon the minutes of the Court, and before the jury had returned its verdict as directed, counsel for plaintiff prayed the Court to sign and seal this Bill of Exceptions which is accordingly done, nunc pro tunc this 4th day of January, 1910.

DAN THEW WRIGHT, *Justice*. [SEAL.]

14 *Directions to Clerk for Preparation of Transcript of Record.*

Filed January 5, 1910.

In the Supreme Court of the District of Columbia, the 5th Day of Jan., 1910.

At Law. No. 49559.

ANDERSON, Adm'x.
vs.
SMITH.

The Clerk of said Court will prepare the following as a transcript of record on appeal: Declaration filed June 22, 1907. Plea filed July 18, 1907. Joinder of Issue filed July 22, 1907. Memo. of Judgment filed Oct. 30, 1909. Note of Appeal filed Nov. 8, 1909, and Bill of Exceptions filed Jan. 4, 1910. Memo. of Appeal Bond filed Nov. 12, 1909. Memo. of Time to file Record filed Dec. 21, 1909.

E. N. HOPEWELL,
Attorney for Pl'ff.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 25, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49559 at Law, wherein Ella Anderson, Administratrix of the estate of Charles P. Anderson, Deceased is Plaintiff and J. Paul Smith is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 14th day of January, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia Supreme Court. No. 2107. Ella Anderson, adm'x, &c., appellant, vs. J. Paul Smith. Court of Appeals, District of Columbia. Filed Jan. 14, 1910. Henry W. Hodges, clerk.

15 MONDAY, *March 7th, A. D.* 1910.

No. 2107.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Appellant.
vs.
J. PAUL SMITH.

The argument in the above entitled cause was commenced by Mr. E. N. Hopewell, attorney for the appellant, and was continued by Mr. H. Prescott Gatley, attorney for the appellee, and was concluded by Mr. L. J. Mather, attorney for the appellant.

16 No. 2107.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Appellant.
v.
J. PAUL SMITH.

Opinion.

(Mr. Justice VAN ORSDEL delivered the opinion of the Court:)

This is an action on the case brought to recover damages for the death of appellant's intestate caused while in appellee's employ as a

laborer. For convenience, the parties will be referred to in the relation they occupied in the court below—appellant as plaintiff, and appellee as defendant.

The evidence shows that the defendant, at the time of the accident, was engaged in wrecking a building in this city; that the work was in charge of his foreman; and that the building had been taken down to the first floor, excepting a large double frame door, which was still standing. The plaintiff's evidence also discloses that the door frame was from twelve to fifteen feet in height, and from ten to twelve feet in width, with a lintel block on top four by four inches extending across the width of the door, and a leaded glass transom underneath, some two and a half feet in width, and semi-circular in form. There were glass panels in both doors, with lights on each side extending to within a foot and a half or two feet of the base. It was also shown that there was a fringe of plaster around the top and on each side of the door frame, which had adhered to it in tearing away the surrounding structure. The weight of the door frame, with this attachment, was estimated at from twelve to fifteen hundred pounds.

A number of men employed on the work were directed by the foreman to take down this frame. Seven men went on the inside for the purpose of lowering it to the ground as it was pried over in that direction by two men on the outside. The men on the inside arranged themselves in such manner that two, Anderson, plaintiff's intestate, and another, were in the center. When the frame was pried over, the men on the inside were either unable to hold it or let it fall in such manner that Anderson was caught under it and crushed to death. It also appears from the evidence that no appliances of any sort were used or furnished by the defendant or his foreman to be used in lowering the door.

When plaintiff had submitted her evidence, a verdict was directed for the defendant. From the judgment entered thereon, this appeal was taken. The case comes here upon a single assignment of error: "That the trial court erred in withdrawing the case from the jury and directing a verdict for the defendant."

The liability of an employer to his employees does not arise from the danger of the occupation in which the employees are called upon to engage, but from accident occurring through the negligence of the employer. It is insisted by counsel for plaintiff that the defendant was negligent in not supplying block and tackle to be used in lowering the door in question. There is no evidence whatever to show that such implements are usually employed for this purpose, or that the method adopted is not the customary one. The burden is on the plaintiff to establish negligence on the part of the defendant. Such negligence can not be presumed, and may only be inferred from facts showing undisclosed knowledge of a condition which exposes the employee to a peculiar danger unknown to him, and which he could not, with the exercise of ordinary prudence and intelligence, have observed. The employee, when he engages his services to his employer, impliedly agrees to assume all the risks ordinarily incident to such employment. If the work demands pecu-

liar skill in the use of the machinery or instrumentalities employed to carry on the work, he assumes the risks incident thereto. He impliedly assumes this risk in his contract of employment.

The rule was well stated in Wood v. Heiges, 83 Md., 257, as follows: "If a servant has knowledge of the circumstances under which the employer carries on his business and chooses to accept employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."

Neither do we deem it to be the duty of the master to warn his servant of apparent danger. The duty being performed by plaintiff's intestate at the time of the accident in question was not such as called for either skill or experience. The door to be lowered
17 was in full view. The method employed was the most ancient known. It required a simple survey of the structure and an estimate of the amount of exertion it would take to lower it. Intestate's fellow-employees in the trial below appear to have had no difficulty in placing what would seem to be a very exaggerated estimate on the dimensions and the weight of the doors and frame. No reason is apparent why this case should be taken out of the rule of assumed risk. Plaintiff's intestate was a mature man of ordinary intelligence, presumed to be capable of doing the very ordinary and unskilled labor he was engaged in at the time of the accident. As was said in Kohn v. McNulta, 147 U. S., 238, where a servant was injured in coupling freight cars: "The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

To hold the master liable in a case like the one before us would be to make him an insurer against accident of every nature befalling the servant while engaged in the work assigned him. This is not the law. The accident was the result of the risk assumed by plaintiff's intestate in the ordinary course of his employment, from a source with which he must be deemed to have been competent, by the exercise of ordinary prudence and intelligence, to judge of the danger involved. The court below committed no error in withdrawing the case from the consideration of the jury and preventing what might have resulted in a sympathetic verdict. The judgment is affirmed with costs, and it is so ordered.

Affirmed.

18 TUESDAY, *April 5th, A. D.* 1910.

No. 2107, April Term, 1910.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Appellant.
vs.
J. PAUL SMITH.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby affirmed with costs.

Per Mr. JUSTICE VAN ORSDEL.
April 5, 1910.

19 WEDNESDAY, *June 1st, A. D.* 1910.

No. 2107.

ELLA ANDERSON, Administratrix of the Estate of Charles P. Anderson, Deceased, Appellant.
vs.
J. PAUL SMITH.

On motion of Mr. L. J. Mather, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

20 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Ella Anderson, Administratrix, as principal, and Julian Morton, as surety, are held and firmly bound unto J. Paul Smith in the full and just sum of Three Hundred Dollars ($300) to be paid to the said J. Paul Smith, or his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of June, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased, and J. Paul Smith a judgment was rendered against the said Ella Anderson, Administratrix as aforesaid, and the said Ella Anderson, Adminis-

tratrix as aforesaid having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. Paul Smith citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Ella Anderson, Administratrix as aforesaid shall prosecute said writ of error to effect, and answer all damages and costs of she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

ELLA ANDERSON. [SEAL.]
Administratrix.
JULIAN MORTON. [SEAL.]

Sealed and delivered in the presence of—
MARGARET CORCORAN.
LEONARD J. MATHER.

Surety satisfactory.
H. PRESCOTT GATLEY,
Of Counsel for J. Paul Smith.

Approved by—
CHAS. H. ROBB.
Associate Justice Court of Appeals
of the District of Columbia.

201½ [Endorsed:] 2107. Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased, Appellant, vs. J. Paul Smith. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun. 17, 1910. Henry W. Hodges, Clerk.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased, appellant, and J. Paul Smith, appellee a manifest error hath happened, to the great damage of the said appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if indement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from

the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of June, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

22 UNITED STATES OF AMERICA, *ss:*

To J. Paul Smith, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Ella Anderson, Administratrix of the Estate of Charles P. Anderson, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 17th day of June, in the year of our Lord one thousand nine hundred and ten.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service accepted this 17 day of June A. D. 1910.

MADDOX AND GATLEY,
Att'ys for J. Paul Smith.

23 [Endorsed:] Maddox & Gatley. Court of Appeals, District of Columbia. Filed Jun- 17, 1910. Henry W. Hodges Clerk.

21 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Ella Anderson, Administratrix of the Estate of

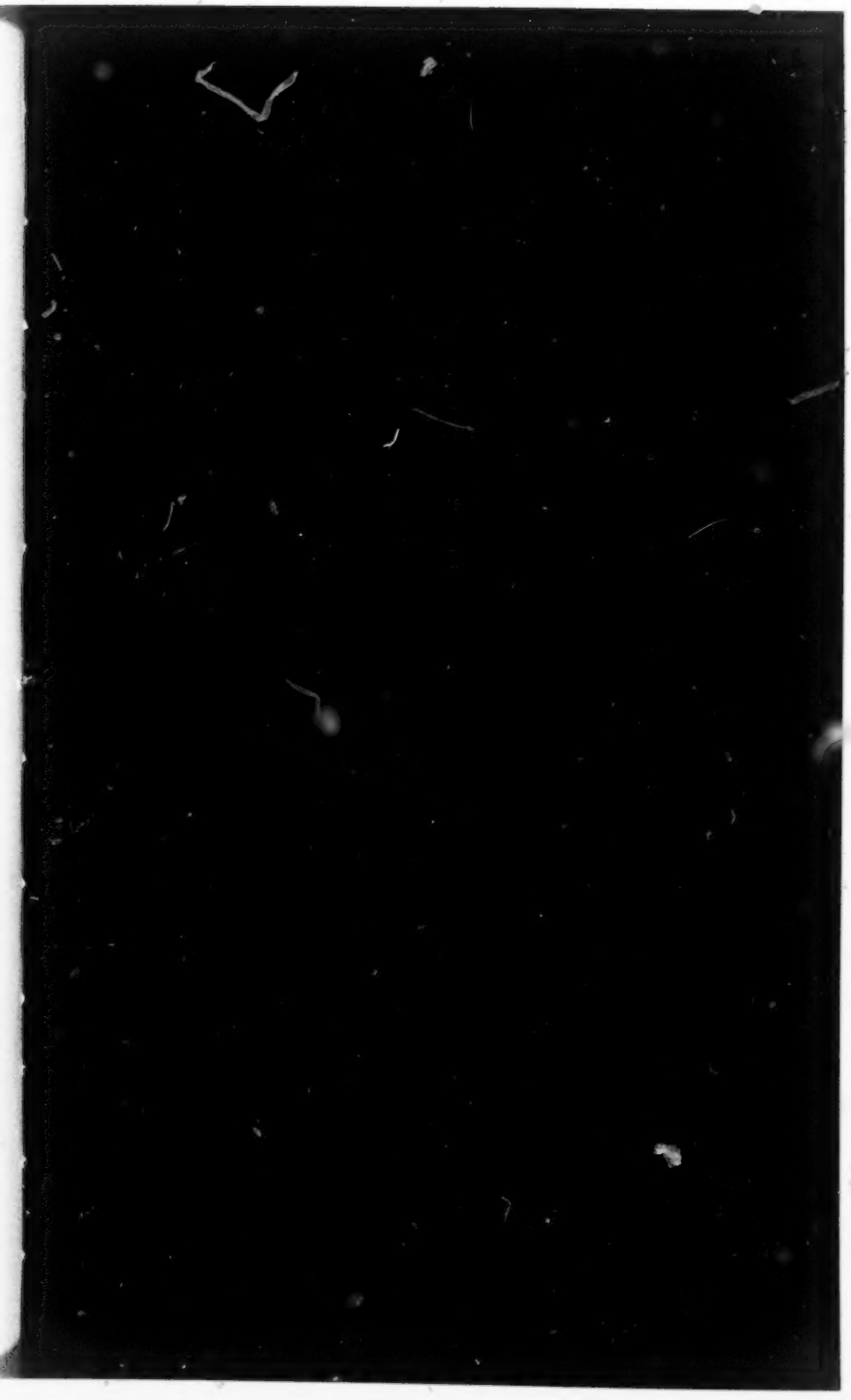
Charles P. Anderson, deceased, Appellant vs. J. Paul Smith No. 2107, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22d day of June A. D. 1910.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,243. District of Columbia Court of Appeals. Term No. 91. Ella Anderson, administratrix of the estate of Charles P. Anderson, deceased, plaintiff in error, vs. J. Paul Smith. Filed June 27th, 1910. File No. 22,243.



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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 91.

ELLA ANDERSON, ADMINISTRATRIX OF THE ESTATE OF CHARLES P. ANDERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

J. PAUL SMITH.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This is an action on the case brought to recover damages for the wrongfully caused death of plaintiff's intestate, when in the employ of defendant in error as a laborer. He was killed by a very heavy double door falling upon him, as he, with five or six other co-laborers, obeyed their foreman's order to take this door down.

The Declaration, in two counts, charges in the first, that the defendant "became and was negligent in that he failed to provide a reasonably fit, proper and safe place for his

employees to work"; and in the second, that he "became and was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door frame."

The proof shows that defendant was wrecking a building in the District of Columbia; that the work was in charge of his foreman, a man named Dougherty; and that the building had been taken down to the first floor in its entirety, save for this large double frame door, which had been left standing (R., 9). This door frame was twelve to fifteen feet in height, and from ten to twelve feet in width with a lintel block on the top, 4" x 4", extending clear across the width of the door, and a leaded glass transom underneath, some two-and-a-half feet in width, and semi-circular in form; that it had glass panels in both doors, with glass side lights on each side, extending to within a foot-and-a-half to two feet of the ground, and also a fringe of plastering around the top and on each side of the door frame as it stood there, while its weight was not less than from twelve to fifteen hundred pounds (R., 7, 8, 9, 10). Seven men were ordered to go on the inside of that door to catch and lower it to the ground, as it was pried over in their direction by two men from the outside, each of which weighed from 145 to 150 pounds apiece, and each of which had a pinch bar four feet in length, which he was using by jumping his weight on the end as they pried this door loose from the dowels that held it in position on the stone sill on which it rested (R., 7, 8, 9, 10). No appliances of any sort were used; there were no implements around there of any kind to take the door down; no ropes, no block, nothing there to take any weight on it; and furthermore, blocks were not even placed against the upright parts of this door to pre-

vent it from slipping after it was pried loose from its supports (R., 7, 8, 9, 10). No warning was given (R., 8, 9). No *particular* disposition was made of the men. They were on the inside of this door, and arranged themselves along the back of it with their arms stretched overhead against the door, in order to take it down and lower it, as they had been ordered (R., 9, 10). Two men were in the center—Anderson, plaintiff's intestate, who was crushed to death, and Richard Collins, who had his shirt and suspenders scraped from his back by this falling door. The others were on either side of these men, and escaped injury (R., 8, 9). The door fell because these men on the inside of the door were unable to hold and lower it, both on account of its weight and top-heavy condition, and its acceleration or increase of striking force gained in falling, which, with its dead weight of 1,200 pounds (R., 7, 9, 10), amounted to an added weight of 5,334 pounds for the 12 feet covered by its descent (R., 11); for it not only took more men—indeed, the whole force that worked on the job—to lift the door frame off Anderson, than had been ordered up there to hold and lower it, as it was pried over toward them, but it afterwards took ten men to lift that door and carry it down to the brick pile (R., 8, 10).

At the close of the plaintiff's case, a verdict for the defendant was directed by the trial court— the Supreme Court of the District of Columbia—which action was later affirmed by the Court of Appeals of the District of Columbia.

It is to correct this error, twice committed, that review by this Court is sought.

ASSIGNMENTS OF ERROR.

1. The trial Court erred in refusing to permit the expert witness Sunderland to testify to the defendant's negligent

manner of taking down the doorway in question; and the Court below erred in refusing to consider the question, though not assigned, because the one general assignment of error there noted covered all exceptions properly taken to the trial Court's rulings throughout the Record.

2. The Court below erred in affirming the action of the trial Court in holding as matter of law that the defendant in error was not guilty of negligence under either or both of the counts of the plaintiff's Declaration, and in directing the jury to return a verdict for the defendant.

3. The Court below erred in holding as matter of law that plaintiff in error's intestate had assumed the risk of injury or death from the failure of the men detailed to keep the door from falling over, though said risk was shown to be not only an *unusual* one but one unappreciated by either said decedent or the six or seven other of his co-employees who went with him for this purpose in obedience to command.

ARGUMENT.

Two courts have already decided this case adversely to plaintiff in error: The Supreme Court of the District of Columbia and the Court of Appeals for the District of Columbia.

The question is whether they have decided it rightly, or wrongly; whether with the law to uphold them, or against the law, and in its very teeth.

There are three assignments of error.

The two latter will together first be considered; and then the first assignment will briefly be covered.

bars, the jerky manner in which this work was being done by the men outside in jumping their weight on the ends of their bars, and there would be the gaining and increasing of the striking force the farther the door fell.

From the above review of the facts and law in the case at bar, therefore, it is clear there was *negligence* on the part of the defendant, and it is equally as clear there was no assumption of this negligence by plaintiff's intestate, *as a matter of law*, while just as clearly does it appear that the fellow-servant doctrine is not properly applicable to it, *as a matter of law*.

It is accordingly urged that the affirmation by the lower court of the trial court's determination of this case, should be reversed, and that it should be remanded for determination by a jury.

LEONARD J. MATHER,
JOHN DOYLE CARMODY,
Attorneys for Plaintiff in Error.

In considering the case upon the second and third assignments of error, three questions present themselves for review.

First. Whether the defendant was negligent, or rather whether the case showed sufficient evidence of negligence to compel the submission of the fact to the jury.

Second. Whether the risk plaintiff's intestate ran when obeying the order of his foreman in charge of this wrecking work was one incident to his employment as a laborer for defendant, or was so open and obvious as that the danger therefrom was apparent, and, therefore *assumed* by him; and

Third. Whether defendant's foreman, Dougherty, was the fellow servant of plaintiff's intestate in ordering the door to be taken down as it stood in the *place* provided by defendant, without proper appliances supplied by defendant with which this work of taking down the door might have been performed with reasonable safety to plaintiff's intestate.

The initial question is decisive of the other two; for if there was no actionable negligence on the part of defendant, there has been no error committed, and there can be no remanding of the case for re-trial; whether plaintiff's intestate assumed the risk of the particular danger which caused his death or not, or whether he was or was not a fellow servant, indeed, to defendant's foreman Dougherty, then in charge of the work.

I.

Two averments of negligence are contained in plaintiff's Declaration:

(a) In failing "to provide a reasonably fit, proper and safe place for his employees to work."

(b) In failing "to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door frame."

or to repeat more briefly:

(a) In failing to provide a reasonably safe place.

(b) In failing to provide reasonably safe appliances.

In taking up the consideration of this point it is interesting to note what the lower courts have had to say thereon.

The learned trial court held that plaintiff's intestate was not entitled to a reasonably safe place to carry on defendant's work, or reasonably safe appliances with which said work might be carried on (R., 12, 13).

Why?

Because: "The law (of negligence) is based upon the proposition that you cannot lay traps for other people. When a man supplies a rope or tool or a machine that is defective, he is laying a trap for anybody he puts to work with it, because people have a right to believe that it is what it purports to be; that is, reasonably safe; and he is negligent because he lays a trap; but he does not when he omits to furnish anything."

Again, "There is no theory upon which any negligence of the defendant is shown by the evidence. The only evidence of negligence on the part of any one is the prying of the door loose, which was done by orders of the foreman. It might have been the negligence of the foreman, but, if it was, he was a fellow servant of the plaintiff, and the defendant is not responsible for it."

So that we have the reasons actuating the trial court, and, they are:

> 1st. That there was no duty making it incumbent upon the defendant to furnish plaintiff's intestate with a reasonably safe place in which to work, or *any* appliances by which the work could have been carried on in a reasonably safe way, and
>
> 2nd. The negligence of prying down the door frame with pinch bars was not the negligence of the defendant but that of a fellow servant.

Looking at the assigned reasons for a moment, it is plain that what the learned trial court must have had in mind was, that where a *place* at which work is being carried on is inherently and necessarily dangerous, no negligence results from carrying on that work in the usual and customary way; and likewise no negligence arises where the servants themselves are making the *place:* when they make unsafe what had originally been supplied to them reasonably safe.

This latter rather falls under the discussion of the fellow servant doctrine. Suffice it here to say, that the *place* was not being made by plaintiff's intestate and his co-servants. The walls were all down. This door alone stood. It was necessary to take it down in due course of time. That time had arrived. Defendant knew all about it. It was his business to know. He wanted it taken down. It was for him to provide a place around about this door that was reasonably safe. If he failed to provide a place that was reasonably safe to carry on his work in the taking down of this door—whether it was unsafe by reason of the size and top-heavy condition of the door, the method of fastening it to the sill, or because no appliances neces-

sary to take it down were supplied—he was negligent. The mere fact that these laborers brought the passive and inherent danger of the place into activity when, in obedience to the order of their foreman, they went up to take this door down, matters not. They did not *create* the danger. It was there from the very inception of the work. It was one of the factors to be taken account of in the removal of this building. It should have been provided for like any other special object of danger arising in the course of the master's work.

Let us test the question of negligence, then, by the rule as laid down by the trial court, that "The law is based upon the proposition that you cannot lay traps for other people."

If a laborer hires himself out to a builder or a wrecker, or any other employment, he has a right to take it for granted that everything reasonably necessary for the proper performance of the work will be supplied.

This is what is guaranteed to him by the law.

In Hough v. Railway, 100 U. S., 213, it was early said:

> "To that end (not to expose the servant unnecessarily), the master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. * * * *It is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business.*"

Similarly was it held by Mr. Justice Day, in Kreigh v. Westinghouse & Co., 214 U. S., 249, 255, 256:

> "The employee is not obliged to examine into the employer's methods of transacting his business, and

> he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances *necessary* to carrying on the business."

To the same point note the terse remark of Mr. Justice McKenna in Railway v. Holmes, 202 U. S., 438, 441:

> "It is the duty of a master to furnish safe places to work in and safe instruments to work with, *and of this there need be no discussion. The duty is a continuing one and must be exercised whenever circumstances demand it.*"

See also on the same question:

> Mather v. Rillston, 156 U. S., 391.
> Railway v. O'Brien, 161 U. S., 451.
> Railway v. Archibald, 170 U. S., 665, 672.
> Railway v. McDade, 191 U. S., 64, 68.
> Railway v. Swearingen, 196 U. S., 51, 62.

If, then, the place for plaintiff's intestate to work in was made unsafe because the work there was ordered to be carried on improperly,—whether because *no* appliances were furnished to aid the men in taking down the top-heavy door, or because the "human appliance" actually furnished to catch and lower this door frame to the ground, as it was pried loose from the outside, was entirely inadequate and insufficient, or because this leverage force, applied on ~~the~~ the outside of the cumbersome and top-heavy door frame and door, was so great as not only to tear it away from the fastenings at its base, but, as well, topple it over in the direction of said plaintiff's intestate with such irresistible force as to crush out his life as he, with the others of his coworkers, stood there in obedience to command in a vain en-

deavor to carry out their master's order—was it any the less a trap than either defective rope, tool or machine would have proved to be?

Let us contrast this reasoning of the trial court with what the Court of Appeals said to the point:

> "The liability of an employer to his employees does not arise from the danger of the occupation in which the employees are called upon to engage, but from accident occurring through the negligence of the employer. It is insisted by counsel for plaintiff that the defendant was negligent in not supplying block and tackle to be used in lowering the door in question. *There is no evidence whatever to show that such implements are usually employed, or that the method adopted is not the customary one.* The burden is on the plaintiff to establish negligence on the part of the defendant. Such negligence cannot be presumed, and may only be inferred from facts showing undisclosed knowledge of a condition which exposes the employee to a peculiar danger unknown to him." * * *

True! although any other appliance than a block and tackle sufficiently proper to insure the necessary precaution would have been all that was necessary.

The very point, however, is as to whether the conditions prevailing at the time were *usual* or *unusual*.

Certain it is that it was only a door and its frame that was ordered to be taken down.

Maybe it was customary to take the usual run of doors down in the manner in which this particular one was sought to be lowered to the ground.

But this door was a very *unusual* one, both as to its size, weight, height and top-heavy condition particularly, as well

as the manner in which it was fastened to the sill upon which it rested, and more especially as to the manner in which it was forced loose from its fastenings.

How, then, could evidence have been adduced to show "that such implements (necessary appliances) are usually employed for this purpose, or that the method adopted is (was) not the customary one"?

What purpose?

The taking down of a door—any door—or this particular door of the size, weight, top-heavy and unwieldy construction disclosed by the Record.

What method?

Sending six or seven men to place themselves along the inside of the door and its frame, with their arms stretched as high overhead as possible, in order to get their combined pressure bearing surface as high up on this door and its frame as could be, while two men on the outside with pinch bars were prying and wrenching and forcing the door frame loose from its base and over upon those trying to support it on the other side.

How could evidence relating to *usual* conditions be applied to *unusual* conditions?

How could customary methods be applied to unusual conditions?

What similarity or likeness is there between ordinary situations and those extraordinary in their nature?

Then what rule of conduct can we have patterned upon the past, when the present only serves to mark the difference?

No; negligence is but a relative and comparative term, and the true rule with regard to it—the only rule—is to have

the duty admeasured by the facts; for always must the particular facts raise the duty, and as the master lives up to or falls short of this standard of what the law reasonably requires of him, at all times, and under all circumstances, so he is guilty or not guilty of negligence.

Thus, if as an incident of the work in question, viz: the wrecking of the building, or, to be more exact, the taking down of this doorway and frame, it was necessary to direct the work to be done in the way in which it was attempted, there would be no negligence.

If, however, it was not necessary to do the work that way, and there was no compellable influence directing the taking down of this doorway without appliances of any sort, then it was negligence, if the use of simple appliances, —such as poles with spikes in the ends as used by men in putting up telegraph and telephone poles, block and tackle, a rope, or even blocks placed at the base to prevent the door frame from slipping when wrenched loose from its fastenings,—would have sufficed to have prevented the doorway and frame from going right over and crushing out a human life as it was forced in the direction of plaintiff's intestate by the powerful leverage of pinch bars four feet long on which these two outside men were jumping their weight in their effort to break it loose from its fastenings.

Moreover, was it not attempted on behalf of plaintiff to put the question directly before the jury by and through the expert witness Sunderland, who alone, or with men alike skilled in figuring strains, leverages and acceleration of the descending and striking force of an object of the size and weight of this door and frame when wrenched from its base by the leverage of these crow bars, could properly calculate and say whether the unusual character of the object to be lowered, coupled with the further fact that it was

firmly fixed at its base with dowel pins probably rusted and corroded from long use, from which position it was being forced by the two outside men with their bars, marked negligence on the part of the defendant?

It is plain from the foregoing that the defendant was *prima facie* guilty of negligence, and this brings us next to the consideration of whether this negligence was assumed by the plaintiff.

II.

Coming now to the question of whether plaintiff's intestate assumed the risk of this large top-heavy door and frame falling upon him and crushing him to death, as in obedience to the order of his foreman he placed himself, with other of his co-laborers, on the inside in order to hold and take it down; we may consider the assumption of risk doctrine as falling naturally under two heads.

1st. Risks incident to the service.

2nd. Risks open and obvious.

Of the former, whenever to be expected from the general course of the employment, they are assumed by virtue of the contract of service.

Of the latter, resulting, as they do from the negligence of the master, they are never assumed, unless so open and obvious as that the danger and peril to be apprehended and appreciated therefrom is glaring and imminent.

Before passing to a more careful examination of these natural divisions of this body of the law, let us note in passing what the lower courts have had to say regarding this question.

The learned trial court said:

> "When a man assumes a risk and is hurt by the assumption of that risk, it is his own fault as much as it is the fault of anybody else, and he cannot recover" (R., 13).

which is a self evidentiary conclusion, and scarcely needs comment.

The lower court took occasion to say when passing upon the question:

> "The employee, when he engages his services to his employer, impliedly agrees to assume all the risks ordinarily incident to such employment" (R., 15).

Unquestionably true!

Again:

> "Neither do we deem it to be the duty of the master to warn his servant of apparent danger" (R., 15).

Sometimes it is; at other times it is not; depending upon whether the master knew of the danger, while the servant was unaware of it; or whether it was alike open and obvious to both.

Yet again:

> "The duty being performed by plaintiff's intestate at the time of the accident in question, was not such as called for either skill or experience. The door to be lowered was in full view. The method employed was the most ancient known. It required a simple survey of the structure and an estimate of the amount of exertion it would take to lower it. Intestate's fellow-employees in the trial below ap-

> pear to have had no difficulty in placing what would seem to be a very exaggerated estimate on the dimensions and the weight of the door and frame" (R., 16).

Thus not only does the learned court below question the uncontradicted testimony of five witnesses as to the dimensions and weight of this door and frame, but as well refers to "ancient methods" as being applicable to present-day needs.

Methought the circumstances always raised the duty and what "ancient methods" have to do with modern conditions is a somewhat puzzling question.

We know life was a thing of naught as affecting the slaves and laboring class of ancient times.

Is it as worthless a thing today?

True it is that the door to be lowered was in full view. But does it follow from that fact, and that fact alone, that "an estimate of the amount of exertion it would take to lower it" was ascertainable at a glance, and because so ascertainable, the risk, danger and peril from taking it down without appliances was assumed?

What could plaintiff's intestate have known as to the weight of this door; what as to its top-heavy condition; what as to how it was fastened to the sill, and the leverage force necessary to pry and force it loose; what as to the added impetus it would get in its descent because of this leverage force exerted at its base; what as to its acceleration of striking force per foot of descent; what as to the aggregate of holding strength of the six other men who were to assist in taking the door down; and what with regard to their disposition along on the inside of the door,

and their holding ability as they pressed against this door and frame with their arms stretched overhead to reach as high as possible?

This point has been taken up in passing, although more appropriately falling under the discussion of what risks are open and obvious, and is more to be discussed hereafter.

Coming back now and examining yet further as to what risks are incident to the service, we find the master's negligence is not such a risk, *unless open and obvious,* as the employee may always take it for granted that everything reasonably necessary for his safety has been done by his employer, and, as was said to the point in Kreigh vs. Westinghouse & Co., 214 U. S., 249, 255, 256:

> "The employee is not obliged to examine into the employer's methods of transacting his business, and he may assume *in the absence of notice to the contrary,* that reasonable care will be used in furnishing appliances necessary for carrying on the business.
> * * * *
> "There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer."

In Hough vs. Railway, *supra,* where a locomotive was thrown from the track by a defective cow catcher or pilot, and the engineer scalded to death by escaping steam, Mr. Justice Harlan in referring to what an employee had the right to assume when entering upon employment, said:

> "It is equally implied in the same contract (speaking of the contract of service as between master and servant and what it implied) that the master shall supply the physical means and agencies for the conduct of his business."

So in the case of Railway vs. Russell, 88 Md., 563, 571, wherein concerning the risks assumed by virtue of employment and what the employee had the right to expect from his contract of service, it was held that a conductor on a suburban electric railway, struck and killed by the unusual nearness of one of the poles adjacent to the track, did not assume any such unusual risk, as it was unnecessary, constituted negligence, and therefore went outside of his contract of service. The court said:

> "On the other hand it is the duty of the master to exercise reasonable care to provide and maintain safe, sound and suitable machinery, roadway, structures and instrumentalities; and he must not expose his employees to risks beyond those which are incident to the employment and were in contemplation at the time of the contract of service; and the servant or employee has a right to presume that the master has discharged these duties. * * *
>
> "He (the conductor) was under no obligation to protect himself against such increased risk. * * *
>
> "No rule of law demands that one shall look out for what he has no reason to anticipate."

Likewise in Railway vs. McDade, 191 U. S., 64, it was held that the *unusually* high car from which a brakeman was knocked and killed in the night time by an overhanging water spout, constituted an *unnecessary* risk which was outside, of, and not, therefore, a proper incident to the contract of employment; and his estate was allowed to recover therefor, the Court epigramatically saying when commenting upon the combined effects of the high car and the low hanging water spout:

> "* * * not to make such a construction safe is a conviction of negligence."

Again, similarly was it said by Mr. Justice Brewer in Railway vs. Baugh, 149 U. S., 386, when speaking to the question of the master's duty under the contract of service with his employee, and hence conversely of what the servant thereby assumed:

> "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machiney with which he is to work, or by which he has been surrounded, shall be reasonably safe. It is the master who is to provide the place, and the tools and the machinery, and when he employs one to enter into his service, he impliedly says to him that there is *no other danger* in the place, the tools and the machinery than such as is *obvious and necessary*. Of course some places of work, and some kinds of machinery are more dangerous than others, but that is something which *inheres in the thing itself, which is a matter of necessity and cannot be obviated.*"

Is it not too plain, therefore, that defendant's failure to supply reasonably safe appliances with which to take down this doorway, whereby the "place" round about it—to which plaintiff's intestate had been ordered—would have been made a reasonably safe place and one from which the operation of taking down this doorway could safely have been performed, constituted negligence on his part, because it was not something *which inhered to the doing of the work, was not a matter of necessity, and not only could have been obviated*, but would and should have been if the plainest dictates of common sense had been observed?

In conclusion to the point, then, and bearing in mind ever that although defendant's business at the time this accident happened was a dangerous business, yet, even as was its hazard, so, too, was the commensurate exercise of care made necessary to reasonably guard against such hazard; and further, that the risk and hazard of employment was *confined* to what was *necessary* to the carrying on of the business for which plaintiff's intestate had been employed.

That is what he assumed by his contract of service.

Only that and nothing more.

So that it is equally plain that because defendant's conduct constituted negligence, the risk of such negligence was not assumed by plaintiff's intestate, unless at the time it was such as to bring home to said plaintiff's intestate a realizing sense of the danger and peril that would result to him from an attempted obedience to the order to take the doorway down.

This brings us to the discussion of whether the particular risk from attempting to do this work was an open and obvious one.

Passing, then, to a consideration of the question of the assumption of risk by plaintiff's intestate from the openness and obviousness of the danger and peril faced by him when, in obedience to command, he went with other of his fellow workmen to take down this doorway; we may concede at the outset that an employer of labor has the right to carry on his business in any manner he sees fit, no matter howsoever negligent it may be.

It is likewise conceded that an employee may assume the risk of such negligence.

To assume such a risk, however, it is necessary not only

that there should be a knowledge of the physical conditions combining to form the danger, but the danger itself must manifest its existence in such an open and glaring manner, and for such a length of time as that a realizing sense of its imminence is brought home to the mind. In other words, not only must there be knowledge of the elements that go to make up the danger, but as well a conception present to the senses of their combined probable effect. So that if knowledge of any element combining to form a danger be lacking, there cannot be any proper or sufficient appreciation of that risk.

Moreover, plaintiff's intestate had the right to take it for granted that due care would be exercised in providing the place, and in supplying all necessary tools and appliances with which to carry on defendant's work; and there was neither necessity nor obligation upon said plaintiff's intestate to look out for possible sources of danger, or to hunt up some dereliction of duty on the part of his employer

Ry. v. Archibald, 170 U. S., 665, 672.
Ry. v. McDade, 191 U. S., 64, 68.
Ry. v. Swearingen, 196 U. S., 51, 62.
Kreigh v. Westinghouse & Co., 214, U. S., 249, 255, 256.

In this case, then, we have a negro laborer, fifty or fifty-two years of age and a cook by occupation, as well as doing most of that kind of work, although he had also worked a long time for defendant.

With the ordinary mentality and intelligence of the negro laborer, what time or opportunity had plaintiff's intestate, even had there been present the ability, to appreciate the risk of obeying the order of his foreman?

Taken away from his other work by command "to come

up here and get hold of this door and take it down," what time or opportunity was there for estimating the weight or the top-heavy condition of this doorway? It is doubtless true that plaintiff's intestate knew his own strength as likewise the approximate strength of his co-workers. But what could he have known about the manner in which, or how firmly this door was fastened at its base by means of the inch dowels actually used for this purpose? What did he know about the possible rusting and corroding of these dowel pins from long use, and the force it would take to wrench and pry this doorway loose from such fastenings; and, above all, with what force this top-heavy doorway would be started over towards where he stood when it was finally jerked loose by the two men with their four-foot bars as they jumped their weight on them in their effort to lift the door frame over and free of its dowel pin fastenings? Indeed, and as a matter of fact, plaintiff's intestate from his position in the middle on the inside of the doorway could not even see what was going on outside of the doorway, much less consider or appreciate the utter recklessness of applying this additional leverage force to the already cumbersome and top-heavy doorway they were then attempting to take down. Again, with the holding strength of these seven inside men applied at about a third of the way to the top of this door frame, of very necessity there must not only be an energetic and forceful starting downward of this doorway and frame, but a considerable falling before the strength of the men could have been brought to bear in checking this heavy falling object. The expert witness, Sunderland, tells us that the striking force for the whole twelve feet of fall would have been 5,334 lbs., which simply serves to illustrate the utter impossibility of a negro laborer

taking into consideration every such element of risk when momentarily confronted with a task for which he had the assurance of law of reasonable and proper safeguarding. There is no evidence to show that plaintiff's intestate considered the command a dangerous one. He never questioned it. Probably never a thought entered his mind, let alone any consideration as to the risk, or any conception as to the combination of elements making up the risk; for it is hardly likely that plaintiff's intestate would have placed himself in the most dangerous situation with regard to this doorway, had he considered for a moment that he was imperiling his safety. Moreover, as it was to plaintiff's intestate, so it appeared to six other of his fellow laborers. Not one ever asked the why and wherefore. No one suggested possible danger, and it may safely be concluded, therefore, that not only was there no apprehension of danger, and therefore no appreciation of any risk, on the part of plaintiff's intestate from the openness and obviousness of any impending peril, but this conclusion is alike true with regard to at least six other minds of about the same mentality as was that of plaintiff's intestate, and present under exactly the same conditions, with the same opportunity for measuring off the quantity of risk and consequent danger from obedience to their master's order.

In determining the question of obviousness, and appreciation of the danger therefrom, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is requested.

Just as in a case of contributory negligence; the question must be one so plain as that the minds of all reasonable men must concur in order to justify a peremptory instruction for the defendant.

Dorsey v. Construction Co., 42 Wis., 583, 598.
Ry. v. Hammett, 13 App. D. C., 370.
Cowen v. Merriam, 17 App. D. C., 186.
Ry. v. Landrigan, 20, App. D. C., 135.
Ry. v. Cooper, 32 App. D. C., 550.
Ry. v. McDade, 135 U. S., 554.
Kane v. Ry., 128 U. S., 91.
Ry. v. McDade, 191 U. S., 64.
Moshuevel v. D. C., 191 U. S., 247.
Kreigh v. Westinghouse & Co., 214 U. S., 249.
Ry. v. Swearingen, 196 U. S., 51, 62.
McCabe & Steen Co. v. Wilson, 209 U. S., 275.

So, too, in cases of the assumption of risk, for, as was said by Mr. Justice Holmes in Schlemmer v. Railway, 205 U. S., 1:

> "Assumption of risk, as extended to dangerous conditions of machinery, premises, and the like, obviously shades into negligence as commonly understood. The difference between the two is one of degree rather than of kind."

It was said in Railway v. O'Brien, 161 U. S., 451, that assumption of risk in its true sense is dependent wholly upon actual and constructive knowledge of the servant of the existence of the danger, and without knowledge of the extraordinary danger, there can be no assumption of risk.

In Butler v. Frazee, 211 U. S., 459, where the question turned upon the appreciation of a risk and danger, which was not only open and obvious *but of long standing*, this Court said:

> "Where the elements and combination out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate and assume the risk of it."
>
> Railway v. Swearingen, 196 U. S., 51.
> Fitzgerald v. Conn. Riv. Paper Co., 155 Mass., 155.
>
> "*The visible conditions may have been of recent origin, and the danger arising from them may have been obscure.* In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury."

How much the more, then, is this true when, as in the case at bar, a direct order to take down this door directly preceded the attempted obedience which caused the death of plaintiff's intestate.

So much so is the extent of the assurance of safety thereby enhanced, as that it practically makes it a question of fact for the jury in nearly all such cases.

Miller v. Railway, 12 Fed. Rep., 600, 602, 603.

To the same effect is Thompson, Administrator, vs. Railway, 14 Fed. Rep., 564, 566, where a laborer who had been ordered to work at excavating a bank was hurt by it falling upon him, and the court said:

> "But this general rule (speaking of the assumption of risks incident to the employment) has its exceptions, one of which is that where the employer places one employee under the control and direction of another and the latter, in the exercise of the authority so conferred, orders the former into a place

> of unusual danger and thus exposes him to extraordinary perils of the existence and extent of which he is not advised, the master is liable. This for the reason that in giving such an order the superior servant stands in the place of the employer." * * *
>
> "As applied to cases such as this, the rule is that the servant may obey the order of his superior and perform the duty unless the danger in doing so is so apparent that a man of ordinary prudence would refuse to undertake it even under the order of his superior."

In Railway vs. Jones, 92 S. W., 244 (which was a case practically on all fours with the one at bar), plaintiff was a member of a bridge-gang, under a foreman, at work erecting a rock crusher. In placing the top of the crusher in position, it became necessary to also use what the witnesses called a "bent," which plaintiff had assisted in making and putting up. After the "bent" had served its purpose, the foreman ordered the workmen to throw it down. Plaintiff helped in so doing, and as the "bent" was pushed over, one end struck a projecting bolt which caused it to kick up and back, knocking plaintiff down and injuring him.

The court said to the point:

> "But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work. But, as plaintiff was busily engaged in work which required his attention, we think

> it was open for the jury to say that he did not know of or fully appreciate the danger, and that, therefore, he did not by continuing at work, assume the risk of injury to which he was exposed by the carelessness of the foreman."

In Brick Company vs. Sobkowiak, 34 Ill. App., 312, 319, where an employee, ordered to work in a clay pit, was injured by a falling bank, the court, holding that the question was one for the jury, said:

> "Where a master orders a servant into a place of known danger, if the danger is not absolute or imminent so that the injuries must almost necessarily result from obedience to the order, and the servant obeys the order and is injured, the master cannot afterwards, in order to shield himself from responsibility, be allowed to say that the servant should have disobeyed the order."

In Railway vs. Egeland, 164 U. S., 93, where a member of a section crew, jumping from a train going about four miles an hour to a station platform, in broad daylight, in obedience to the command of the conductor, who was his direct superior, was hurt, this court held that it was a question for the jury; the risk being not so obvious as to beget a necessary legal conclusion of assumed risk.

Said the court, speaking by Mr. Justice Peckham:

> "If the danger was not so great under the circumstances but that the plaintiff might reasonably believe that he could obey it by taking proper care, especially as his superior commanded it, and if his purpose was to obey in pursuance of his sense of duty, and without waiting to think or consider the risk

> of danger, he jumped, then it would not be contributory negligence (assumption of risk) to obey and jump."

So was the law stated in Railway vs. Bourman, 212 U. S., 536 (for this case likewise involved a section hand jumping from a moving train under the order of his foreman), where the court said:

> "Since the plaintiff jumped from the train in obedience to a suggestion, if not an order of his immediate superior, the section foreman, the jury might have found that the plaintiff reasonably thought he could rely upon the judgment of the section foreman, and, that under the circumstances, the plaintiff's act was not so obviously reckless and dangerous as to constitute contributory negligence."

In Railway vs. Heerey, Administrator, 203 Ill., 492, plaintiff's intestate was killed by the parting of the engine and tender as he was standing with one foot on each, shoveling coal into the fire, and the court held:

> "There are other cases where, by the order of the master, or one standing in that relation, the servant is directed to encounter a danger, and his duty being that of obedience, he does not assume the risk."
>
> * * * * * * * *
>
> "The employee must always exercise the degree of care which an ordinarily prudent person would have exercised under the same circumstances, but he does not assume the risk resulting from a direct command" (Cases cited).

The doctrine is well illustrated in the case of Railway v. Ward, 90 Va., at pages 687, 691 and 692. In this case, the

plaintiff was ordered by his boss or foreman to dig a groundhog hole, with sides unsupported and in carrying out that order, the sides of the hole caved in on him.

The court said:

> "When the servant acts under the orders of his master, and is injured * * * it cannot be said with any degree of reason, that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and *may rely upon the skill and knowledge of his master*, and is not free to act on his own suspicions.
>
> "If, therefore, the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even, when, like the servant, he was not entirely free to choose."

Again, in Haley v. Chase, 142, Mass., 316, 322 and 323, where a teamster was ordered to drive his team under a gateway, and in so doing was injured, it was held:

> "The test is not only what each knew, but what each reasonably ought to have known concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. * * * *The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it and he may be in a less favorable position to see and judge of the surrounding dangers;* and

> when he is *suddenly* called upon to perform a piece of work in a particular manner, under the eye of his employer, *he may not reasonably have time for the most careful observation.*"

In Walker vs. Scott, 8 Am. Neg. Rep., 405, where plaintiff was hurt, by the side of a trench into which he had been ordered, caving in on him, it was held that the question was one for the jury, the court saying:

> "Master and servant do not stand on an equal footing, even when they have equal knowledge of danger. The position of servant is one of subordination and obedience to the master, and he has a right to rely upon the superior knowledge and skill of the master and is not entirely free to act upon his own suspicions of danger."

So in Kegan vs. Kavanaugh, 62 Mo., 232, it was directly held that obedience to an order did not constitute an assumption of risk. In this case a hod carrier had been ordered to the building of a stone wall at the foot of an embankment of earth, which not being shored, afterwards caved in upon him.

The court said:

> "It is undoubtedly the duty of a master, where his servant is engaged in hazardous employments to see that every reasonable precaution on his part to insure safety is observed. The primary duty of the servant is obedience and it is not to be expected that he will upon imaginary danger of which he may be conscious assert his right to relinquish his employment. He naturally looks to his employer for the observance of all reasonable and proper precautions and his continuance in the service when such precau-

> tions have not been observed is rather to be attributed to confidence reposed in those to whose superior judgment he yields."

In Pressed Steel Car Company vs. Herath, 110 Ill. App., 596, the roof of a large factory building damaged by fire was being taken down, and plaintiff's intestate, under the direction of a foreman, was pulling on a rope when a portion of the roof fell upon him and killed him. Said the court:

> "Risks involved in carrying out the master's orders are not assumed by the servant unless the danger is so obvious and threatening that no prudent man would undertake it. The servant does not stand on the same footing as the master. The master commands it and it is the primary duty of the servant to obey, and if, in discharging this duty, the servant is injured through the negligence of the master, reason and authority concur in requiring compensation. That the danger was not of that obvious and immediate character which no prudent man would risk, is shown by the fact that the six other workmen unhesitatingly proceeded with Smith (Plaintiff's intestate) to carry out the order of the foreman."

Likewise, in Long's Administrator vs. Railway (Ky.), 68 S. W., 1095, a section hand, obeying the order of his section boss to ride on a hand-car to his place of work when he knew that a fast train was overdue, and being killed by a collision with this train, it was held that he had not assumed the risk, the court saying:

> "A servant is not called upon to set up his unaided judgment against that of his superiors. He may

rely upon their orders. Ward vs. Railway (Ky.), 65 S. W., 2. As has been well said, the servant's dependent and inferior position is to be taken into consideration; and, if the master gives him positive orders to go on with the work and the servant is injured, he may recover unless the work was so obviously dangerous that a servant of ordinary prudence, situated as he was, would not have obeyed.

"In this case, Long was a mere laborer. The section foreman under whose direction he worked, represented the master, and it was Long's duty to obey his orders in the usual course of business. When he received an order, it was not his duty to sit in judgment upon its propriety, or to enter into a discussion with him as to the facts upon which it was based. He had a right to presume that improper orders would not be given, and to assume that the section foreman would not direct him to take risks that were improper. If he was injured while obeying the orders of his superiors, and by reason of his negligence, he may recover unless the danger was such that a person of ordinary prudence and situated as Long was, would not have taken it."

Again, in Seeds vs. The American Bridge Company, 68 Kan., 522, the facts in this case were that during the rebuilding of a bridge, plaintiff, under the direction of a foreman, was fastening the chain around the beams being hoisted into position. The plaintiff left the place where he was thus engaged too soon on one occasion, and the foreman, ordering him back, told him not to be in such a hurry to get away from there; that he, the foreman, would tell plaintiff when to get away. Following upon this plaintiff stood too long in this position after he had fastened the chain around the beam, for upon its being hoisted from the

ground the beam swung against the loose plank from which the plaintiff was endeavoring to reach a place of safety, and he was precipitated to the ice below and badly injured.

The court said:

> "Not only must the employee have known or had reasonable opportunity to know the dangerous conditions existing, but he must have known or had reasonable opportunity to know the danger to which he was exposing himself by reason of these conditions.
>
> "The last element of the equation is as much a matter of fact for the jury as is the former, and in determining it the jury must take into consideration all of the circumstances and surroundings. It might here be claimed plainly that the plaintiff should have grasped these details of danger and correctly deduced therefrom the proper estimate of the risks incident thereto. We must, however, remember that this would depend not a little upon the capacity, age and condition of the plaintiff."

In Millard vs. Railway, 173 Mass., 512, plaintiff was ordered upon a pile of lumber, near which he had been working two days, but which he had not noticed, and when about to carry out the order to pry off a piece of the timber, the pile gave way and he was injured.

The court said:

> "It is, however, argued that the plaintiff, if he had looked at the pile, would have noticed its dangerous condition and if he did not see it he might have seen it and understood it if he had looked. This is assuming that the condition of the pile was dangerous from simple inspection. It does not ap-

pear from the evidence that the danger was apparent. It would be going far to say that the plaintiff should have known what was not apparent to the superintendent. But we do not think that the plaintiff, when he received the sudden order to go upon the pile, was bound, at his peril, to inspect it or ascertain whether it was safe or not. To say as a matter of law that the plaintiff assumed the risk in this case is going further than the court has gone in this class of cases, and further than we think it ought to go.

"The danger in this case was owing wholly to an isolated act of carelessness on the part of a superintendent. This is not a danger which naturally grows out of the employment or is necessarily incident to it."

In Western Stone Company vs. Musical (Supreme Court Illinois, 1902), 63 N. E., 664, plaintiff was injured by dirt and gravel falling upon him as he was loading a wheelbarrow in a quarry, under the direction of his foreman.

The court said:

"Appellant contends that it was error to refuse the instructions to find for the defendant for the reason that appellee knew the bank was liable to fall under the existing conditions; that his knowledge of the danger was equal to that of the master; that the danger of the falling dirt was one of the perils of the business. It is the duty of the master to use reasonable diligence in seeing that the place where the work of the servant is to be performed is safe for that purpose. This duty of the appellant was disregarded by it, and when the appellant obeyed its command to shovel or to load the dirt into the wheelbarrow, he had a right to rest upon the assurance,

> which this command implied, that there was no danger. The master and servant in such case are not altogether upon a footing of equality. The servant's duty is mere obedience and when *acting under an order he assumes no risk unless he acts recklessly in obeying it.* Whether he acted thus recklessly or whether he acted as a reasonably prudent person should act, are questions of fact to be determined by the jury."

In Herriman vs. Railway, 27 Mo. App., 435, a laborer in the employ of the defendant railway company, was working upon the track under the control and direction of a boss, removing with other of his co-laborers, a certain iron rail from the track; that the boss directed these three or four men who had hold of one end of the rail, to throw it around in a given direction, which they attempted to do with the result that one end of the rail flew back and injured plaintiff. The court said:

> "The plaintiff in accepting employment from defendant in the capacity of a section hand, assumed to himself all the hazards of life and limb incident to such work performed in the usual way, free from the interference or negligence of those placed over him. But where, as in this case, he works under the immediate supervision and direction of a superior officer or agent, who directs the manner of executing the particular work and the servant, without contributory negligence on his part, is injured obeying his superior, the company is liable, provided the conduct of the superior had any time the elements of negligence or want of proper skill.
>
> "It is the plain duty of the servant in such relation to obey the direction and command of his superior, unless the act directed be so obviously dan-

> gerous to his senses as to make obedience rashness amounting to contributory negligence (assumption of risk) on his part. But contributory negligence, (assumption of risk) is a matter of affirmative defense."

The case of Miller vs. Railway, 17 Fed., 67, turns upon the assumption of risk by an employee after being ordered by his foreman into a position of danger upon a push-car for quick transportation to a nearby station, and the court said:

> "Between master and servant, when the servant enters into the relation, he assumes all the risks ordinarily incident to the duty he undertakes to perform, and on the other hand the master binds itself not to expose him to any extraordinary risks or such as ordinarily do not belong to the employment. In accordance with this rule, the law is that if the master or any other servant standing towards the servant injured in the relation of a superior or vice-principal, orders the latter into a situation of greater danger than in the ordinary course of his duty he would have incurred, and he obeys, and is thereby injured, the master is liable, unless the danger is so apparent that to obey would be an act of recklessness. A servant may obey orders coming from one having authority over him with power to discharge him for disobedience, unless to obey would expose him to danger so glaring that a prudent man would refuse to enter into it even under such orders."

To the same effect are the following:

> Wintenberger vs. Railway, 68 Kan., 642.
> Railway vs. Hart (Ky.), 64 S. W., 650.

Kapaczynski vs. Wells & French Co., 110 Ill. App., 477.
McKee vs. Tourtellotte, 167 Mass., 69, 71.
Barnett & Record Co., vs. Schlapka, 208, Ill., 426, 433, 434.
Railway vs. Wrenn (Tex.), 50 S. W., 210.
Hagerty vs. Evans, 87 Minn., 435.
Lord vs. Wakefield, 185 Mass., 214.
Wall vs. Railway (Tex.), 50 S. W., 210.
Bane vs. Irwin, 172 Mo., 306.
Stephens vs. Railway, 86 Mo., 221.
Eichholz vs. Power Co., 68 App. Div. (N. Y.), 441. (Affirmed on appeal 174 N. Y., 519.)
Patterson vs. Railway, 76 Pa. St., 389.
U. S. Electric Co. vs. Sullivan, 22 App. D. C., 115.
Shortel vs. City of St. Joseph, 104 Mo., 114, 120.

From the foregoing resumé of the cases to the point, is it not plain, therefore, that this limitation of the assumption of risk doctrine governs the case at bar; and that the command of the defendant, through his foreman, Dougherty, having immediately preceded and occasioned plaintiff's intestate to do what he did do, that there was neither that free and deliberate exercise of the will which alone could give the senses free scope to sufficiently observe, or the opportunity thereafter which alone would enable the mind to grasp, weigh and thus realize and appreciate the danger and peril of the situation?

Whether, then, from the consideration of the law which fastens it to the reason that the master and servant are not upon the same footing, and that the prudent servant may rely, within reasonable limits, upon the superior knowledge

of his master, and should not set up his own judgment as against that of his master; or whether upon the ground that a command calls for prompt obedience and that the same is an implied assurance that there is no *abnormal* danger—no danger outside that to be expected from the nature of the employment; no danger from the master's negligence—the *law* itself gave to plaintiff *the right* to have a jury pass upon the questions at issue.

III.

Has the fellow servant doctrine any proper application to this case?

The authoritative source of this doctrine as enunciated by Mr. Chief Justice Shaw in the celebrated case of Farwell v. Boston and W. R. Corp., is of but comparatively recent date, as years mark the cycle; yet the question has proved a vexed one, and has produced a great contrariety of legal opinion throughout the courts of the country, both State and Federal.

Defendant below laid no stress upon the point, and presumably his position then will be his position now; so that the point will be but briefly covered.

The principle of law requiring the master to furnish to his employees a reasonably safe place in which to work, and reasonably safe appliances to work with, is axiomatic.

Therefore, the question is, whether the command of foreman Dougherty to perform this dangerous service, was, or was not, an order in furtherance of the defendant's own work, and consequently embraced within the lines of defendant's duty towards plaintiff's intestate, or was something more than the law required of him?

Bearing in mind always that the defendant had to furnish the place round about this doorway for its removal; if the "place" actually furnished by him, whether through his foreman or anybody else, was made unsafe because of the negligent manner in which the work was ordered to be done, defendant is as responsible therefor as though the order and direction had come out of his own mouth.

While, generally speaking, all those who enter into a common employment bear the relation of fellow servants each to the other, yet among the established exceptions to the general rule as to the non-liability of the common employer to one employee for the negligence of a co-employee in the same service, is one which arises from the obligation of the master not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.

Hough v. Ry., 100 U. S., 213.
Ry. v. McDaniels, 107 U. S., 454, 459.
Railway v. Baugh, 149 U. S., 368, 387.
Gardner v. Ry., 150 U. S., 349, 359.
Mather v. Rillston, 156 U. S., 391.
Hines v. Georgetown Gas Co., 3 App. D. C., 369, 376.
Staubley v. Power Co., 21 App. D. C., 160, 164, 167.

So, here, defendant was removing this building. He knew this large, top-heavy door had to be taken down. He knew or should have known, it was a dangerous object to be removed without appliances. It was his duty to provide those

appliances in order that the *place* where the men had to take down this door might be reasonably safe for that purpose. Just as it is always the master's duty to properly provide against special objects of danger, whether they exist underground or overhead. Defendant didn't. Neither was any warning given. That was his negligence. It wasn't much that was asked of him; not much that the law expected of him; yet it would have saved a human life.

It is not sufficient, either, that the master employed a superintendent or foreman and thus endeavored to relieve himself of all personal responsibility; even though there be no proof to point out the incompetency of such superintendent or foreman.

The duty to furnish a reasonably safe place is an absolute, positive, personal and continuing one, and the risk the servant assumes of the negligence of his fellow servants, does not contemplate the assumption of the master's negligence in failing in its performance.

Fastened by law upon the master, *his* the duty, for a breach of which he is held strictly accountable. This duty is inalienable and non-assignable, and if there be any negligence, it is immaterial whether such negligence be his own, or that of his servant; as such servant, no matter what his grade or position in the master's service, is the *alter ego* of the master himself.

So held the court in Railway v. Holmes, 202 U. S., 438, 441 (overruling the Dixon case in 194 U. S.), when determining that the negligence of a train dispatcher, causing a collision, was the master's negligence, and not that of a fellow servant.

Railway v. Herbert, 116 U. S., 642, 647, 648.
Gardner v. Railway, 150 U. S., 349, 359.

In Railway v. Holmes, *supra*, Mr. Justice McKenna said:

> "'There is no ground!'" it is insisted, "'either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them.'"
>
> "There is an instant answer to the contention. Instead of according with principle and authority, it is opposed to both. It contradicts a concession elsewhere made in the argument, that it is the duty of a railroad company to promulgate adequate rules and regulations for the safety of employees engaged in the dangerous duty of operating trains, and at times telegraph orders for the movements of trains. It is the duty of a master to furnish safe places to work in and safe instruments to work with, and of this there need be no discussion. *The duty is a continuing one and must be exercised whenever circumstances demand it.* * * * But something may occur to one of the trains, with or without fault of anybody, which may endanger the other. May a train dispatcher know it and not guard against it?
>
> "*A negative answer would be revolting.*
>
> "A master must furnish a safe place for his servant to work in, and the risk the servant assumes of the negligence of a fellow servant, does not exempt from that duty."

So, too, is McCabe v. Steen Co. & Wilson, 209 U. S., 375, 380; and Kreigh v. Westinghouse & Co., 214 U. S., 249.

A very interesting as well as instructive case is that of

Manuel v. The Mayor, etc., of City of Cumberland, which was decided by the Court of Appeals of Maryland, in June, 1909. A sewer trench was being dug under the supervision of the foreman of the city sewer works, who was in turn under the street superintendent and city engineer. Plaintiff was a laborer, engaged with other workmen in digging this trench. The sides, unbraced and unsupported, caved in upon plaintiff, where a gas main (a dangerous object), was located close to the trench. The trial court, holding that the foreman was a fellow servant to plaintiff, and taking the case from the jury, was reversed on appeal; the appellate court saying that the vital question of the case was one of omission of a positive duty of the master, which could not be delegated so as to avoid liability for neglect.

The theory upon which the court proceeded was that the defendant below, appellee above, knew or could have apprised himself of the location of this gas main, and it was incumbent upon him to so locate the whole course of the trench as that it would not be unsafe by reason of its method of construction, or its proximity to any object which might reasonably be expected to create special danger in the performance of the work.

So is the case at bar; for it matters not whether it be constructive work, or destructive work, that the master is carrying on; whether it be building up or taking down. The duty to be exercised, relatively admeasured, is the same. Here, not only was the method used for taking that door down, an improper and negligent one, but, as well, its very presence there served to mark the existence of a special danger which, unguarded against and unprovided for, was appellee's negligence, personal to himself, which could not be delegated.

In Staubley v. Power Co., 21 App. D. C., 160, 167, a laborer was ordered by his foreman, in conjunction with another man, to draw up a heavy piece of iron cable through a hole in the floor, to a narrow space behind the switchboard, without warning him of the dangers of the place. In attempting to obey this order, plaintiff was injured by coming in contact with a projecting iron lug, heavily charged with electricity.

Mr. Justice Morris, after quoting from the Hough and Mather v. Billston cases, *supra*, as well as from the case of O'Connor v. Adams, reported in 120 Mass., at p. 427, held:

> "Upon this record as now made it is very evident that there is testimony tending to show that the appellant was sent by his foreman, the agent of the company, into a place of unusual danger without proper warning to him of his danger, and without proper precaution for his protection. Upon this record he was entitled to go to the jury; and we think that it was error, in view of the authorities cited, not to have permitted him to do so."

So in this case plaintiff's intestate was ordered by his foreman into a place of unusual danger, without any proper precaution for his protection, and without any warning having been given him.

After a very thorough review of the authorities on the fellow servant doctrine by Mr. Justice Robb, in Carter v. McDermott, 29 App. D. C., 145, where the question was whether the negligence of a conductor to equip his car with a lamp, duly supplied by the street railway company, whereby a collision resulted, and another coservant was injured,

was the continuing personal negligence of the railway company, or the negligence merely of a fellow-servant, the court said:

> "The duty of equipping its cars with such light is an imperative duty resting upon the company, and one which it cannot delegate so as to escape liability for injuries suffered by a servant by reason of the omission or neglect on the part of the agent or servant entrusted therewith."

Even conceding that foreman Dougherty's negligence concurred with that of plaintiff's intestate, when he ordered these men to take down that door, knowing, as he must have known, that he was risking their lives; yet, defendant is none the less liable for *his* failure to furnish and provide such fit and proper appliances as would have made the place in which to take this door down reasonably safe.

Defendant's negligence commenced, so to speak, when he planned to take that whole building down, for he then knew this door was there; knew that it was an object of special danger; knew that the time would come when it would have to be taken down, and yet never provided a reasonably safe way for its removal. This negligence continued up to the time it caused the death of plaintiff's intestate.

In Railway v. Cummings, 106 U. S., 700, an engineer sustained injuries by reason of a collision with another train of the same company, and it was held:

> "That the trial court did not err in charging the jury that the company, if its negligence had a share in causing the injuries of the plaintiff, was liable notwithstanding the contributory negligence of his fellow-servant."

Likewise was it said in Deserant v. Railway, 178 U. S., 409, which was an action brought to recover damages for an explosion in a mine:

> "It is undoubtedly the master's duty to furnish safe appliances and safe working places, and if the neglect of this duty concurs with that of the negligence of a fellow-servant, the master has been held to be liable."

Again in Railway Co. v. Lyon, 203 U. S., 465, a brakeman on a freight train lost his life on a spur track, which stopped at a trestle with a buffer at the end, not calculated to resist a car pushed by an engine, but only to stop one pushed by hand, or by the wind. The engineer in charge of the train operated his engine so as to push the cars against the buffer with such violence as to break the buffer away, and precipitate the brakeman down into the canon which was there, and it was held in this case that:

> "Where the negligence of the master in not supplying proper appliances has a share in causing injuries to an employee, the master is liable, notwithstanding the negligence of a fellow-servant, who may have contributed to the accident."

So, too, in Wilmington Mining Company v. Fulton, 205 U. S., 60, 75, the same doctrine was upheld. In this case, the injury was caused by an explosion of mine gas.

Chief Justice White, who delivered the opinion, said:

> "Where two concurring causes contribute to an accident to an employee, the fact that the master is

> not responsible for one of them does not absolve him from liability for the other cause, for which he is responsible."

Similarly, in Kreigh v. Westinghouse & Co., *supra*, it was held:

> "That where the negligence of the master in failing to provide and maintain a safe place contributes to the injury of the employee, the master is liable notwithstanding the concurring negligence of those performing the work."

The court in Standard Oil Co. v. Brown, 31 App. D. C., 371 (approved by this court on May 31, 1910), where a similar question was raised on facts that showed a fellow servant of Brown negligently threw a bale of straw from the loft where it was stored through an opening in the floor on top of Brown, whose duties called him underneath this opening, said:

> "Plaintiff was not injured as the result of a single breach of duty on the part of his fellow servant Coleman. For nine years Coleman had been in the employ of defendant, and for most of the time had been engaged in the work he was doing at the time plaintiff was injured." * * *
>
> "Defendant, if guilty of permitting a dangerous condition to exist in its barn, cannot relieve itself from responsibility by hiding behind the negligence of Coleman. The negligence of a fellow servant will not relieve the defendant from liability where there is evidence from which the jury could find that the defendant was guilty of negligence and that its negligence contributed to the injury."

Likewise in this case, defendant knowing this door had to be taken down, permitted this dangerous condition to continue, without supplying and providing proper appliances for its removal with reasonable safety to those actually engaged in the work.

As the test must always be whether the negligent act or omission was in discharge of the master's or servant's duty, it is plain to see in this case—the negligent act or omission complained of being the failure to provide proper appliances for the taking down of this door, so that the place thereabouts would have been made reasonably safe—that it was defendant's fault, *his* negligence, rather than that of his foreman Dougherty. Dougherty merely called into activity the inherent danger that had existed with defendant's knowledge sufficiently long to have enabled him to properly provide and guard against it.

Of course, the master is never liable when furnishing originally fit and proper place and appliances for use, which afterwards become unfit, through the transitory and momentary negligence of the servant. Then there is no personal wrong done by the master; nothing left undone by him that he should have done in the exercise of ordinary prudence and care. It is the negligence of the instant, marking, as it does, the independent and improper act of the servant, rather than anything the master could properly have guarded against.

Such is not this case.

Ample the time and opportunity for defendant to have provided proper and fit appliances for the taking down of this door.

It was his duty to provide the place, and when he furnished it, and it was put to its intended use, and killed

plaintiff's intestate because he had not provided these appliances; therein was defendant at fault; therein was he negligent.

Apropos, and in conclusion of a discussion which has unduly lengthened itself out, reference is again made to one of the latest utterances of the Supreme Court of the United States in the Kreigh v. Westinghouse & Co. case, *supra*. Here a foreman bricklayer was knocked from where he was at work on a wall by the improper handling of a swinging bucket attached to a derrick. Clearly the act and negligence of a fellow-servant, if the derrick and its adjuncts had been furnished reasonably safe. But it had not been, for there was evidence tending to show that "the proper construction and management of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom."

Said the court:

> * * * "In view of the testimony referred to we think it was a question for the jury to determine whether the character of the derrick furnished by the master discharged his obligation to furnish and maintain for the plaintiff and his associates a reasonably safe place in which to labor."

Furthermore, it was held:

> "Where workmen are engaged in a business, more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a

> matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer, and the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character."

To the first assignment of error it may be sufficient to say that the testimony of the expert witness Sunderland should have been allowed to the question of the negligence of the defendant.

This for the reason that so many elements were there present that only an expert mind could justly and properly estimate on the whole equation of negligence.

In correctly estimating the risk of danger and peril to be apprehended from the manner or method in which the defendant sought to take this doorway and frame down, it would be necessary, of course, to figure out not only the strength of resistance of these seven men, applied as it was about a third of the height of this door frame from the ground, but, as well, the further fact that the first thing happening in all likelihood when the door was hoisted and forced over its dowel-pin fastenings, would be to have it slip at its heel, unblocked there as it was, which would greatly accelerate its downward motion and make it a matter of impossibility for these men to hold up this door and prevent it crushing out the life of at least one of them.

So, too, there were other elements entering into a proper conception and understanding of this risk, and consequent negligence of the defendant. There would be the question of the leverage force, exerted by these four-foot pinch

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No. 91.

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vs.

J. PAUL SMITH.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

SAMUEL MADDOX,
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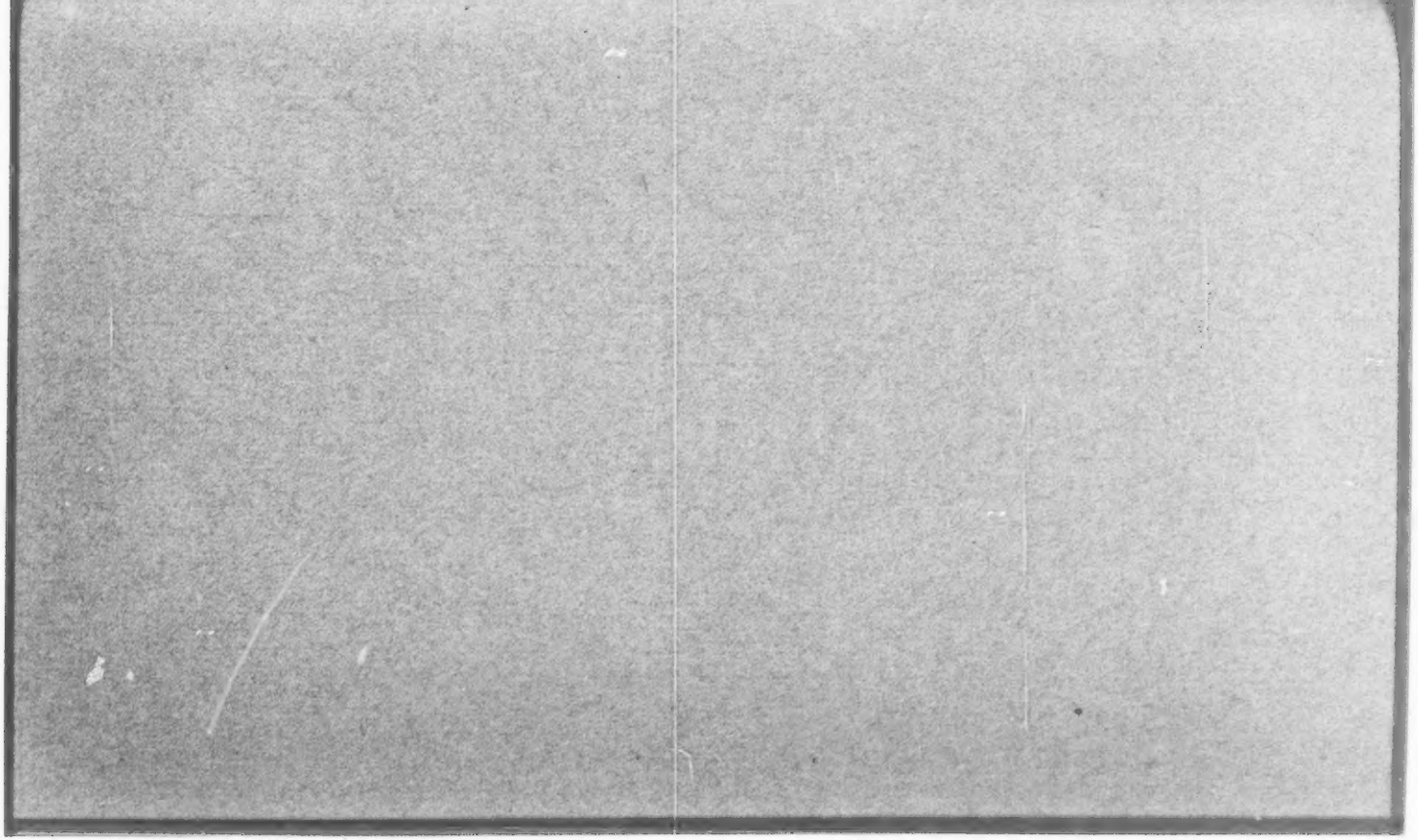
Attorneys for Defendant in Error.



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Statement of the Case.

This is a suit brought to recover damages for the alleged negligent killing of plaintiff's intestate.

On the 29th day of June, 1906, defendant was engaged in tearing down an old building in Georgetown, in this District. Anderson, plaintiff's intestate, was one of the men employed in doing the work.

The building had been torn down as far as the first floor, and the floor was all clear of obstructions and rubbish (R., p. 8).

There remained standing, however, a large door frame. While this frame was being taken down it fell upon Ander-

son, and from the injuries thus received he died. A man named Dougherty was foreman of the work. The only order that he gave with respect to taking down the door frame was: "Men, come up here and get hold of this door and take it down." He didn't say any particular number of men, but just said, "go up there and take it down" (R., p. 9).

There were seven or eight men engaged in the work, some on either side of the door frame, and two other men pried the door out of the sockets in which it rested. Anderson stood in front of the door, in the middle, and they were making ready to pull the door over towards him (R., p. 9).

When the two men pried the door loose the other men on the sides let go, and it fell over, striking Anderson and inflicting the injuries from which he died.

Anderson had worked for defendant a long time (R., p. 7), and the record shows he had been at work on this building at least four days before the accident happened (R., p. 10).

These are the substantial facts that appeared on the trial of the case, at the close of which the trial court directed a verdict for the defendant.

From this judgment an appeal was taken to the Court of Appeals of this District, which court affirmed the judgment of the trial court.

From this judgment of affirmance the present appeal is prosecuted.

ARGUMENT.

There is no assignment of errors in the record, but we assume the argument of counsel for plaintiff in error will be addressed to the propositions that the trial erred in taking the case from the jury (*the only error assigned in the court below*) and that the Court of Appeals erred in affirming the judgment of the trial court, predicated of the directed verdict.

The declaration in the case contains two counts. The negligence charged in the first count is that defendant "*was negligent in that he failed to provide a reasonably fit, proper and safe place for his employees to work.*" The negligence charged in the second count is that defendant "*became and was negligent in that he failed to furnish reasonably fit and proper machinery, reasonably adequate and sufficient tackle or implements, or a reasonably safe and proper number of men for the removal of said door frame.*"

The declaration having thus affirmatively stated the specific acts of negligence alleged to be the basis of the right of recovery against the defendant, there is no room for the application of the doctrine of *res ipsa loquitur*.

Jaquette *vs.* Capital Traction Co., 34 App. D. C., 41.
Sullivan *vs.* Capital Traction Co., 34 App. D. C., 358.

There being no presumption of negligence against the defendant in the case, it necessarily follows that the duty of proving the negligence alleged rested upon the plaintiff. There was an utter failure of proof as to the averments of both counts of the declaration.

With regard to the claim that defendant was negligent in failing to provide a safe place, as charged in the first count of the declaration, it appeared in evidence that the house had been torn down as far as the first floor, and that the floor was clear of all obstructions and rubbish. There

was left standing only this door frame, which, of course, had to be taken down in order to complete the demolition of the building. Therefore the place was as safe as it could be in the light of what had to be done—in fact it was the only place where the work could be done.

> "The obligation of a master to provide reasonably safe places and structure for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow-servants."
>
> Armour vs. Hahn, 111 U. S., 313-318.

With regard to the alleged negligence of the defendant in failing to supply reasonably fit and proper machinery, tackle or implements for the removal of the door frame, as averred in the second count of the declaration, there was not one word of evidence offered to show that machinery, tackle or implements are generally used in taking down a door frame such as is described in the record, or that the work was not being done in the usual and customary way. In the absence of such evidence there could be no inference of negligence.

The master is only bound to use such appliances and devices as are commonly used by others engaged in the same business.

> Ball vs. United States Express Co., 32 App. D. C., 177-182.

In Asphalt Company vs. Mackey, 15 App. D. C., 110, the rule is clearly stated:

> "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of business.

> No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."

And where appliances and instrumentalities are furnished, to hold the master responsible, a servant must show that the appliances and instrumentalities so furnished were defective. A defect cannot be inferred from the mere fact of injury, but there must be some substantive proof of the negligence.

Schneider *vs.* American Bridge Company, 31 App. D. C., 120, 127.

Asphalt Company *vs.* Mackey, *supra*.

The court below with respect to this question says (R., p. 15):

> "The liability of an employer to his employees does not arise from the danger of the occupation in which the employees are called upon to engage, but from accident occurring through the negligence of the employer. It is insisted by counsel for plaintiff that the defendant was negligent in not supplying block and tackle to be used in lowering the door in question. *There is no evidence whatever to show that such implements are usually employed for this purpose, or that the method adopted is not the customary one.* The burden is on the plaintiff to establish negligence on the part of the defendant."

It thus appears, we respectfully submit, there was no affirmative proof of negligence on the part of the defendant. Under these circumstances there was nothing left for the trial court to do but to withdraw the case from the consideration of the jury, and direct a verdict for the defendant.

Aside from these considerations there are certain principles of law to which the facts of this case are applicable, each of which is a complete bar to a right of recovery against the defendant.

First. The risk incident to the work being done by Anderson was assumed by him when he accepted the employment.

> "It is an elemental principle that an employee, when he enters into service, agrees to assume all risks ordinarily incident to his employment; and, if he is of mature years, experienced in the business undertaken, and knows what instrumentalities are to be used by him, he contracts that he will assume the risks incident to using that class of instrumentality, as well as any other risk incident to the business; and, if the master uses proper care in providing the kind contemplated, the employee cannot complain, although some other kind might have been less dangerous; his contract hushes his complaint, regardless of the employer's negligence."
>
> Railway Company *vs.* Davis, 54 Ark., 394.

See also—

Sullivan *vs.* India Mufg. Co., 113 Mass., 398.

A servant

> "assumes not only all the risks incident to such employment but all dangers which are obvious and apparent. * * * If he voluntarily enters in, or continues in, the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk, and to waive any claim for damages against the master in case of personal injury to him."
>
> Crown *vs.* Orr, 140 N. Y., 450.

The burden is on the plaintiff to establish negligence of the master and his own care. The presumption is that the master discharged his duty, and this presumption must be fairly overcome by proof of his personal fault or negligence.

McMillan *vs.* Saratoga, &c., Co., 20 Barb., 449.

> "The master is not responsible for an accident happening in the course of his service unless the master knew that it exposed the servant to peculiar danger and the servant did not."
>
> *Id.*, 454.

> "If a servant with knowledge of the circumstances under which the employer carries on his business, chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open and obvious. In such cases it is not a question whether the place prepared for him to occupy, and which he consents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."
>
> Wood *vs.* Heiges, 83 Md., 257.

> "Obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has the right to have and use imperfect methods and tools and to ask others to enter his employ to aid him in such use and that in so doing he does not undertake to insure the employee."
>
> Ragon *vs.* Toledo, &c., Co., 97 Mich., 265.

See also—

Carrigan *vs.* Washburn, &c., Co., 170 Mass., 279.

It is not the duty of a master to warn his servant of apparent dangers. He should look for himself and see that which requires no special skill or knowledge to detect.

> "The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to every one. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."
>
> Kohn *vs.* McNulta, 147 U. S., 238.

A servant

> "cannot be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself and where therefore the application of the maxim '*Volenti non fit injuria*' is completely justified."
>
> Lord Halisbury in Smith *vs.* Baker, 60 L. J. Q. B. N. S., 683.

Second. The death of Anderson was due entirely to his voluntary act in placing himself in a position of danger.

Let us briefly at this point consider the evidence as shown by the record. This house had been torn down as far as the first floor, which was perfectly clear of obstructions. The only remaining thing left standing was this door frame. There was nothing hidden about it, no concealed danger, but, on the contrary, it was clearly visible to every one.

The men employed were told to take it down. Nine of them undertook the work, several of them placing themselves on each side, two, with short crowbars, undertaking to pry the door out of the sockets in which it rested, while Anderson placed himself "in the middle of the door, and they were going to pull the door over towards him" (R., p. 9). There is no evidence to show he was told to take the position he did and, in the absence of such evidence, it must be assumed he acted voluntarily and of his own motion. He must necessarily have known that his position was a

dangerous one, and that if, for any reason, the door fell he would be injured. Having thus voluntarily placed himself in this dangerous position, and the injuries received being consequent upon that act, no right of recovery exists.

> "It is undoubtedly the law that an employee is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them, if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger."
>
> Kane *vs.* Northern Central Ry., 128 U. S., 91-94.

In Sardo *vs.* Moreland, 17 App. D. C., 219, it appeared that appellees were dealers in game in the Center Market in this city, and appellant was in their employ. There was a slaughtered deer lying on the floor of the aisle near the game stalls, which was in the way. Moreland, one of the appellees, stated that he would have it removed. Later one of the appellees suggested to get a rope and hoist the deer to the ceiling above the stalls. One Carter got the rope, which subsequently proved to be old and frayed. The rope was run through the holes in the iron lattice work at the top of one of the pillars near the top of the market house. It seems there was an iron hook attached to the pillar, which had been used on former occasions for hoisting deer by means of a rope thrown around it. Whether the hook was in place at the time did not appear. While Carter and a man named Lipscomb were endeavoring to hoist the deer, one Reed and appellant Sardo went to their assistance. The suggestion or direction to do so came to Sardo from Reed, whose orders Sardo, at the time of his employment, was told to obey. The words of the former to the latter were: "Come on, Joe, and help raise the deer at the game stand."

The rope caught in the lattice work, and after tugging at it in vain for a time, Reed got on a barrel and Sardo followed him; and they again tugged at the rope, while Lipscomb and Carter sought to boost the deer with their shoulders from beneath. They were able to hoist the deer only about three or four feet. Then Sardo said to Reed that he was going to swing off the barrel and throw his entire weight upon the rope, which he did. In a moment the rope broke, and Sardo was precipitated to the floor and injured.

The court, at page 226, say:

> "But even if we assume that there was actual negligence on the part of Moreland, and that he had expressly authorized and directed the use of a rotten rope on this occasion, and that he had expressly authorized and directed it to be run through the interstices of the lattice work, it is still very plain that the accident which occurred to the appellant was the direct result of his own thoughtless and improvident, although well-meant, action. No one directed the appellant to get on the barrel, in order the better to pull the rope; no one directed him to swing off from the barrel at the end of the rope and thereby to add the weight of his body to the force which was exerted in order to raise the deer. That was undoubtedly a dangerous proceeding, which he would not have been justified in pursuing even at the direct and positive command of Moreland (Railroad Company *vs.* Jones, 95 U. S., 439). But, so far as the record shows, there was no suggestion from any one that he should do this thing. It was his own voluntary act to do it. Had he remained upon the floor, or even upon the barrel, tugging at the rope, even though the rope had been broken in the effort, it is very clear that the accident would not have occurred, or at all events would not have occurred in the manner and to the extent to which it did occur. To the appellant's own action, therefore, must be attributed the injury which he received and not to any negligence on the part of the employers.
>
> "We think there was nothing in this cause to be submitted to a jury; and we are of the opinion that the trial court was entirely right in directing a verdict for the appellees."

In Hayzel *vs.* Railway Company, 19 App. D. C., 359, it appeared that appellant was employed as a conductor by appellee. On the evening when the accident occurred appellant, as conductor, was in charge of a car with one Brown as motorman. When the car reached Ninth street and New York avenue, as it was making a trip westward, the lights on the car became extinguished, and it was found impossible to light them again, and the remainder of the trip was accomplished without lights. The motorman refused to make the return trip without a headlight, and so, when the next car came up to the station in the street at the west end of New York avenue, the appellant sought to have his car, No. 10, connected with it, and so to be taken back to the barn at the other end of the line. Two futile attempts were made to effect the connection. The appellant then noticed that the drawheads of the two cars were not on a level, and supposing this to be the cause of their failure to connect, went between the two cars, and, holding the two drawheads on a level, directed the motorman of the second car to bring that car nearer so that the drawheads might connect. But there was again failure. The drawhead of the second car shot out towards the plaintiff, and his arm was caught between the bumpers, and rather severely injured.

At the trial there was offered in evidence a rule of the company providing:

> "When a car is blocked on the road from any cause whatever, it is the imperative duty of the conductor to leave his car instantly, and by every means in his power to help get the cars in motion with as little delay as possible; and as soon as the obstruction is removed, to get on his car at once; the gripman must remain in charge of the cars at all times."

In affirming the ruling of the trial court directing a verdict for the company, the court say, pages 371, 373:

> "The rule of the company, which required the conductor of a car to use 'every means in his power

to help to get the car in motion' when it had been blocked, did not require him to put himself in a position of danger for that purpose. If it were to be construed that such was the requirement, it would also have to be held that by assuming the employment that plaintiff also undertook the risk. Whether he was warned of his danger in attempting to go between the cars, which was testified to by the two motormen and the conductor of the other car, and which was denied by himself, thereby raising a question of fact, which, if it stood alone, might properly have been left to the jury to determine, is of no consequence, since, under the ordinary rules of conduct that govern reasonably prudent men, and by the action of the two cars in the first attempt to couple them, he must have known that there was danger in going between them in the manner in which the plaintiff did, and for the purpose for which he went."

* * * * * * *

"We fail to find in the record any evidence of negligence on the part of the defendant company. The act of the plaintiff, although well meant and inspired by a zeal to do his duty, was not the dictate of due caution on his part; and to his want of care and prudence the unfortunate accident must be attributed. In our opinion there was nothing in the case to be submitted to a jury; and we think that the trial court, which was of the same opinion, was correct in so ruling and in directing a verdict for the defendant."

In the case of Tuttle *vs.* Detroit and Milwaukee Railway Company, 122 U. S., 189, 194, it was claimed that a brakeman who was injured in coupling cars had a right to go to the jury on the question whether the defendant company was not negligent in having too sharp a curve in its road where it entered a yard. This court, speaking through Mr. Justice Bradley, said:

"The perils in the present case, arising from the sharpness of the curve were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his

> employees have reason to suppose is in proper working condition. Everything was open and visible and the deceased had only to use his senses and faculties to avoid the danger to which he was exposed. One of these dangers was that of the draw bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that as an experienced brakeman he did know it, for it is one of those things which happen, in the course of his employment, under such conditions as existed here."

See also—

Southern Pacific Company *vs.* Seley, 152 U. S., 145.

Third. The negligence, if any was established, was the negligence of the fellow-servants of appellant.

Under the evidence offered there can be no doubt as to the cause of the falling of the door.

Two men undertook with crowbars to pry the door from the sockets in which it rested. As soon as it was pried loose the men having hold of the door let go of it and it fell. These are the simple facts. All of the men engaged in the work of taking down this door were engaged in a common employment.

It is not necessary to do more than state the rule of law with respect to the fellow-servant doctrine.

This court, in Northern Pacific R. R. Co. *vs.* Herbert, 116 U. S., 642, 647, states it:

> "The general doctrine as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled.
>
> "When several persons are thus employed, there is necessarily incident to the service of each the risk

> that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: 'He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.' Chicago & Milwaukee Railroad Co. *vs.* Ross, 112 U. S., 377, 383."

There can be no difficulty in applying this rule to the facts in this case.

We respectfully submit that there is no error in the judgment appealed from, and it should therefore be affirmed.

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